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No. 93-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1992

JANET LEVER,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,
RAYMOND MACK, PROVOST,
RUDOLPH WEINGARTNER, DEAN,
COLLEGE OF ARTS AND SCIENCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 8, 1993

QUESTION PRESENTED

Must an employer's communication of an adverse employment decision to an employee be unequivocal and unambiguous in order to satisfy the "made and communicated" requirement of *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), before the short statute of limitations period applicable to Title VII claims may begin to run against the employee?

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Petitioner Janet Lever respectfully prays that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 9, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Lever* v. *Northwestern University*, 979 F.2d 552 (7th Cir. 1992). (App. A-1) The district court issued a Memorandum Opinion and Order which is reported as *Lever* v. *Northwestern University*, 58 Fair Emp. Prac. Cas. (BNA) 756 (N.D. Ill. Oct. 4, 1991). (App. B-1) The magistrate appointed by the district court as special

master issued a Report on Timeliness of Charge on June 11, 1991. The special master's Report is reported as *Lever* v. *Northwestern University*, No. 84 C 11025, 1991 U.S. Dist. Lexis 15311 (N.D. Ill. Jan. 11, 1991). (App. C-1) The district court's Memorandum Opinion and Order of February 5, 1990 granting in part and denying in part defendants-respondents' motion for summary judgment and ordering a separate hearing on the timeliness issue is reported as *Lever* v. *Northwestern University*, 55 Fair Empl. Prac. Cas. (BNA) 1137 (N.D. Ill. Feb. 2, 1991). (App. D-1)

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1992. Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.2, on February 1, 1993 the Court extended the time for petitioner to file her petition for a writ of certiorari until April 8, 1993.

The Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

This case involves: (1) Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, as amended, (''Title VII''), specifically § 706(e) of Title VII, which, prior to November 21, 1991, provided that:

> ''A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with

> a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency'';

and (2) the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (''1991 Act'' or ''1991 Civil Rights Act''), specifically § 112 of the 1991 Act, 105 Stat. 1078-79, whose effective date was November 21, 1991 and which provides that:

> Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended —
>
> (1) by inserting ''(1)'' before ''A charge under this section''; and
>
> (2) by adding at the end the following new paragraph:
>
> ''(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.''.

STATEMENT OF THE CASE

The decision below of the Court of Appeals for the Seventh Circuit conflicts with the decisions of the First, Second, Third, Fourth, Fifth and Ninth Circuits as to the importance of unequivocal notice to Title VII civil rights claimants before the short statute of limitations period (either 180 or 300 days, 42 U.S.C. § 2000e-5(e)) can begin to run against such claimants. *See Rivera-Muriente* v. *Agosto-Alicea*, 959 F.2d 349 (1st Cir. 1992); *Pauk* v. *Board of Trustees*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Colgan* v. *Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 379; *English* v. *Whitfield*, 858 F.2d 957 (4th Cir. 1988); *Merrill* v. *Southern Methodist University*, 806 F.2d 600 (5th Cir. 1986); *Hoesterey* v. *City of Cathedral City*, 945 F.2d 317 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992). It conflicts with both the letter of this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and the important balance between the rights of employers and employees to fair notice struck in *Ricks*. The decision below also conflicts with the expression of policy inherent in the recent enactment by Congress of section 112 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), in which Congress explicitly overruled this Court's post-*Ricks* decision in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989). By section 112, Congress required that as to seniority systems a potential Title VII civil rights claimant have unequivocal notice of the prospective application of the system to the claimant before the limitations period as to such a claim would begin to run.[1]

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1. The instant petition involves section 112 of the 1991 Civil Rights Act only insofar as it serves to inform this Court's view of congressional intent. The instant petition in no way depends on whether the provisions of the 1991 Act apply to pending cases.

This petition presents a situation in which undisputed vagueness in the procedure for final tenure decisions at Northwestern University left the timing of the final tenure decision as to the petitioner herein uncertain and a matter of conflicting evidence and factfinding below. The district court below dismissed petitioner's claim of Title VII discrimination, having found that the decision to deny petitioner tenure effectively occurred at a date sufficient to allow Northwestern to assert that the petitioner's claim was time-barred by the 300-day limitations period. This factual finding and consequent dismissal occurred in the context of procedures for final tenure decisions that the court of appeals below found to be shrouded in uncertainty. The petition thus presents this Court with an opportunity to amplify its decision in *Ricks* and to affirm that notice of an employer's decision subject to a Title VII claim must be unequivocal before the short limitations period as to such claims begins to run. Apart from the decision below, every court of appeals that has considered the question has insisted on this rule of unequivocal notice. If allowed to stand, the decision below will permit systematic employer ambiguity and vagueness in decision-making to be transformed into a basis for defeating federal civil rights claims by means of the statutory limitations period. It will also impose elaborate fact finding burdens on the lower courts at the threshold dismissal stage of Title VII actions that are appropriately left for resolution during the evaluation of the merits of such actions. The significance of this can be measured by noting that over the recent fifteen month period commencing October 1, 1991 and ending December 30, 1992, 72,173 claims of employment discrimination were filed with the EEOC.

Petitioner, Dr. Janet Lever, is an assistant professor of Sociology. In 1974, she was hired by respondent Northwestern University in the Sociology Department of its

College of Arts and Sciences. Pursuant to University policy, Professor Lever became eligible for tenure in the 1979-80 academic year which was her sixth year with the University. (App. F-2) At Northwestern, as at most universities, tenure virtually assures lifetime employment because a tenured faculty member can only be removed for serious misconduct or neglect of duty. (App. F-2) Professor Lever approached the tenure process confident of her chances of success. (Tr. at 95, 101)[2]

As the Seventh Circuit observed in its decision in this case, the promotion and tenure process at Northwestern "shrouds the identity of the decisionmaker." *Lever* v. *Northwestern University*, 979 F.2d 552, 554 (7th Cir. 1992) (App. A-3). The published steps in Northwestern's tenure process were set forth in the Faculty Handbook of the College of Arts and Sciences, a publication of Northwestern University ("CAS Handbook") (App. E) and in the Northwestern University Faculty Handbook (App. F). As it developed, evidence regarding the University's actual decision-making process in general and in this case was inconsistent with and materially different from that described in the faculty handbooks.

Pursuant to an order of the district court below (App. D), it was considered necessary for a special master to conduct a hearing at which conflicting evidence was presented on the issues of who actually made the decision to deny tenure (App. C-11-C-16) and when the final decision was communicated to Professor Lever. (App. C-8-C-10) The Dean of the College of Arts and Sciences, respondent Rudolph H. Weingartner,

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2 Citations to "Tr. at ___" are to the transcript of the hearing held before the special master.

testified that he held the actual authority to deny tenure. (Tr. at 24) This statement is inconsistent with the University's CAS Handbook which states that the Dean only has the power to "recommend" tenure, not to make a final decision. (App. E-4 ("[T]he Dean sends a recommendation about each candidate to the Provost and informs each candidate of that recommendation.")) It is also inconsistent with the language in Dean Weingartner's correspondence with Professor Lever in which he refers to his role as that of making a "recommendation" to the Provost of the University. (Apps. G, H, K) *See also* App. I (Dean's letter of Jan. 15, 1981 to Professor Arnold S. Feldman referring to Dean's "recommendation"). Nevertheless, Dean Weingartner testified that the University's final tenure decision was made and communicated to Professor Lever in May 1980 when he informed Professor Lever that he would "not recommend to the Provost that [she] be promoted to the rank of associate professor." (App. G) (letter of May 5, 1980)

Other evidence showing ambiguity in the tenure decision procedure was also offered. It was uncontroverted that in his May 1980 letters, Dean Weingartner established a unique procedure whereby he agreed to reconsider his recommendation that the Provost deny Professor Lever tenure if she submitted for review a completed manuscript then in progress. (Apps. G, H) Professor Lever testified that, because she was unsure of the significance of these letters and the unique reconsideration procedure established therein, she sought the advice of Northwestern's Provost, respondent Raymond W. Mack. Professor Lever asked the Provost whether a final tenure decision had been reached, intending to file an appeal if such a decision had been made. (Tr. at 79, 108) Pursuant to University policy, an appeal from a denial of tenure had to be taken within six months of the adverse decision. (App. F-4)

The undisputed testimony of the Provost was that he "advised her not to file an appeal . . . while the dean was reconsidering his decision." (Tr. at 79) This statement of the Provost lead Professor Lever to believe that a final decision on her tenure was still pending. (Tr. at 108-09)

In the face of conflicting evidence, the special master concluded that it was not the Provost who made and communicated the University's final adverse tenure decision to Professor Lever in his February 12, 1981 letter to her. (App. K) Rather, the master concluded that Dean Weingartner held the actual authority finally to deny tenure and that he made and communicated this adverse decision to her in May 1980. That being the case and because this communication occurred more than 300 days before Professor Lever filed her charge with the EEOC, Professor Lever's claim was time-barred. (App. C-25) *See* Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e).

The district court adopted the conclusions of the special master on the conflicting evidence and dismissed the case. Memorandum Opinion and Order of the District Court of October 4, 1991. (App. B-1)

On appeal, the Seventh Circuit considered the evidence relating to the Dean's effective authority to deny tenure. The court acknowledged that "[o]ne could read [the handbooks] as saying that the Dean does nothing but recommend, leaving the decision to the Provost." *Lever*, 979 F.2d at 554. (App. A-5) The court even chastised Northwestern for its vagueness, stating, "Northwestern could do its faculty (and the courts) a favor by writing accurate descriptions of its procedures. The handbooks are vague and can be understood to describe steps inconsistent with the process that, according to both Dean and Provost, Northwestern actually follows." *Id.* at 556-67. (App. A-10) Notwithstanding the unquestioned

ambiguity of the evidence, the court, reasoning that "factual ambiguity ensures affirmance" and that "Professors can cope with some ambiguity," affirmed because the district court's decision as to the conflicting evidence was not clearly erroneous, 979 F.2d at 554, 557. (App. A-4, A-10)

REASON FOR GRANTING THE WRIT

I.

This Court Should Grant Certiorari to Remedy a Split in the Circuits Created by the Opinion Below and to Make Clear That Notice of an Employer's Decision That Is Subject to a Discrimination Claim Under Title VII Must Be Unequivocal and Unambiguous Before the Short Statute of Limitations Period Applicable to Title VII Claims Begins to Run Against an Employee.

Petitioner submits that it is undisputed that the "notice" to petitioner was equivocal, ambiguous and the subject of conflicting evidence and that it is imperative that this Court reject such notice as a basis for the onset of the limitations period applicable to Title VII claims. Instead, the Court should take this case and hold, as most circuit courts have, that only unequivocal notice to the employee is sufficient. Permitting the decision below to stand will cause disruption and generate unnecessary threshold litigation in the tens of thousands of Title VII charges filed with the EEOC each year.

In *Ricks* v. *Delaware State College*, 449 U.S. 250 (1980), this Court held that the limitations period for a Title VII claim based on a denial of tenure does not begin to run until the employer's allegedly discriminatory final tenure decision has been "made and communicated" to the employee. 449 U.S.

at 258.[3] In so doing, this Court struck a careful balance between the protection of the valid claims of employees and protection of employers from stale claims by combining the requirement that notice to employees be made clear before their Title VII claims can accrue with the congressional establishment of a relatively short period of limitations. The short limitations period permits an employer to know within a relatively short period whether it is confronted with a claim. It is at the same time important that the adverse employment decision is "made and unequivocally communicated" to the employee so that the employee will know when a possible claim exists.

The Seventh Circuit's decision in the instant case conflicts with the decisions of every other court of appeals that has considered the proper meaning of the "made and communicated" rule announced in *Ricks* and, in so doing, fails to adhere to the requirements of the *Ricks* decision itself and to the balance between employer and employee notice struck by Congress in Title VII and reflected in *Ricks*. All other circuits that have addressed the question have found, as a matter of law, that notice of an adverse employment decision to the

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3. The *Ricks* "made and communicated" standard, which was initially applied in a Title VII context, was extended to cover claims under 42 U.S.C. § 1983 in *Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (limitations period begins when "the operative decision is made — and notice given"). It has also been applied to numerous other statutory schemes, including the Age Discrimination in Employment Act, *Aronsen* v. *Crown Zellerbach*, 662 F.2d 584 (9th Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983), the "whistleblower" protection provision of the Energy Reorganization Act, *English* v. *Whitfield*, 858 F.2d 957 (4th Cir. 1988), and the Employee Retirement Income Security Act, *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992).

employee must be unequivocal, otherwise the balance between employer and employee is undone. By allowing notice herein to be vague and ambiguous, the Seventh Circuit permits the balance to be shifted so that the onset of the limitations period for the employee becomes uncertain and hence a potential trap for the claimant.

The uncertainty created by the decision below will harm the courts as well as employees by giving rise to extensive and wasteful litigation of the threshold limitations period question, thereby delaying consideration of the merits of Title VII claims and the disposition of cases. The seven years this case was litigated in the district court, including several motions, reference to a special master, and an evidentiary hearing, all without ever reaching the merits, is a testament to the wastefulness of such threshold litigation.

A. The Seventh Circuit's Opinion Conflicts with Every Other Circuit That Has Considered the Issue

The petitioner in *Ricks*, a professor of education, brought suit against Delaware State College alleging national origin discrimination in the College's decision to deny him tenure. As in the present case, Ricks' application for tenure was denied following a number of evaluations and recommendations and, on June 26, 1974, Ricks, like Professor Lever, was offered a 1-year terminal contract pursuant to the guidelines of the American Association of University Professors so as to avoid a *de facto* grant of tenure. Ricks' terminal contract expired on June 30, 1975. Two months before his termination, but more than 300 days after Ricks' receipt of the June 26, 1974 letter offering him a terminal contract, Ricks filed a charge of discrimination against Delaware State College with

the EEOC. He subsequently received a "right to sue" letter and thereupon filed a complaint in federal district court. In response to the College's motion to dismiss the complaint as untimely because Ricks' claim had accrued upon his receipt of the June 26, 1974 letter, Ricks argued that the limitations period did not commence until the date his employment terminated and that therefore his filing was well within the limitations period. This Court rejected that argument and held that "the filing limitations periods . . . commenced[] at the time the tenure decision was made and communicated to Ricks." *Rick*, 449 U.S. at 258.

In interpreting the "made and communicated" rule of *Ricks*, the First, Second, Third, Fourth, Fifth and Ninth Circuits have uniformly and consistently required an employer to show either that it communicated the alleged discriminatory employment decision to the employee unequivocally so that a reasonable employee would have known that the decision had been made ("constructive knowledge"), or that despite the ambiguity, the employee actually knew that the decision had been made ("actual knowledge"). *See Rivera-Muriente* v. *Agosto-Alicea*, 959 F.2d 349, 353 (1st Cir. 1992) (employment discrimination claim accrues "when the plaintiff knows, or has reason to know, of the injury on which the action is based"); *Pauk* v. *Board of Trustees*, 654 F.2d 856, 859 (2d Cir. 1981) (tenure discrimination claim "accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action"), *cert. denied*, 455 U.S. 1000 (1982); *Colgan* v. *Fisher Scientific Co.*, 935 F.2d 1407, 1418 (3d Cir. 1991) ("alleged unlawful employment practice . . . must have inflicted harm which was or should have been noticed, or it will not have triggered the limitations period"), *cert. denied*, 112 S. Ct. 379 (1991); *English* v. *Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988) (effective communication occurred because the "notice of the challenged employment decision

itself was in form final and unequivocal''); *Merrill* v. *Southern Methodist University*, 806 F.2d 600, 605 (5th Cir. 1986) (limitations period ''begins to accrue when the plaintiff knows or reasonably should know that the discriminatory act has occurred''); *Hoesterey* v. *City of Cathedral City*, 945 F.2d 317, 319 (9th Cir. 1991) (claim ''accrues when a plaintiff knows or has reason to know of the injury which is the basis of his action''), *cert. denied*, 112 S. Ct. 1941 (1992).

Following *Ricks*, to demonstrate constructive knowledge, these circuits have properly focused on the finality of the employer's decision and the clarity with which that decision and its finality are communicated to the employee. Constructive knowledge will only be imputed to the employee if the employer's communication was unequivocal. *See, e.g., Rivera-Muriente*, 959 F.2d at 353 (proper focus is on the ''clarity of the notice received''); *English*, 858 F.2d at 962 (''[o]nly upon receipt of [unequivocal] notice does the filing period begin to run''). To demonstrate actual knowledge, the focus shifts to the acts of the employee. The fact finder does not simply weigh the evidence of ambiguous notice. Rather, the employer bears the burden of introducing additional evidence that the employee was actually aware of the nature and finality of the adverse decision before the short statute of limitation period will begin to run. *See, e.g., Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 594 (9th Cir. 1981) (''employer . . . [has] burden of establishing notice''); *Hower* v. *Richardson-Vicks, Inc.*, 1990 U.S. Dist. Lexis 15982 (E.D. Penn. 1990) (employer offered as evidence employee's own actions which demonstrated that the employee knew the employment decision was final), *aff'd without op.*, 935 F.2d 1281 (3d Cir. 1991). Otherwise, the very short limitations period could work as a trap for employees with valid civil rights claims.

The Seventh Circuit in the instant case has departed from the standard developed and consistently applied by its sister circuits both in its reasoning and in its conclusion. The analysis in the decision below begins with the explicit recognition that "Northwestern's rules shroud the identity of the decisionmaker." *Lever*, 979 F.2d at 554. (App. A-3) The Seventh Circuit augments this acknowledgment of the vague and obscure nature of Northwestern's tenure decision process by further noting that "[t]he handbooks [describing the process] are vague and can be understood to describe steps inconsistent with the process that . . . Northwestern actually follows . . .." *Id.* at 557. (App. A-10) In the face of these observations, the court below reasoned that in all cases of appellate review of a factual question, "factual ambiguity ensures affirmance."

This assertion flies in the face of the holdings of the other circuits. In those circuits, where an employer's communication of an adverse employment decision is ambiguous or equivocal, that ambiguity prohibits a fact finder from imputing constructive knowledge to the employee. If the fact finder nevertheless imputes constructive knowledge to the employee, the inconsistent finding of ambiguity in the employment decision process must ensure not an affirmance, but a reversal. *See Colgan*, 935 F.2d at 1419 (reversing lower court because unfavorable job performance evaluation was not unequivocal communication of an adverse employment decision). Contrary to the Seventh Circuit's observation that "[n]o rule of law says that employees win all close cases," *Lever*, 979 F.2d at 554 (App. A-4), where the question is when and by whom a decision is "made and communicated" in employment discrimination cases, all circuits considering the question have heretofore agreed that in close cases — that

is, cases where the employer's communication has been equivocal — the employer cannot defeat the employee's civil rights claim by invoking the limitations period as an affirmative defense. The Seventh circuit's central premise that ambiguity always requires affirmance is directly at odds with the law of every other circuit that has addressed the issue. *See* cases cited *supra* at pp. 12-13.

A district court decision from within the Seventh Circuit itself provides an excellent example of the proper analysis. In *Carpenter* v. *Board of Regents*, 529 F. Supp. 525 (W.D. Wis. 1982), a case remarkably similar to the instant one, the plaintiff brought an action under Title VII for an allegedly racially motivated denial of tenure at the University of Wisconsin at Milwaukee. The question before the court was whether a letter from the University's Dean refusing to endorse the tenure recommendation of the plaintiff's department and a faculty committee constituted a final decision to deny tenure or whether the final decision on tenure was made by the University Chancellor nearly six months later. After a comprehensive review of the entire tenure process, of the published regulations, policies and procedures of the University and of the statements made to the plaintiff, the district court concluded that the Dean's letter taken in that context and despite its offer of a terminal contract did not constitute an unequivocal expression of a final decision but rather was "'an expression of intent that did not become final' until the Chancellor's decision was issued." 529 F. Supp. at 532 (quoting *Ricks*, 449 U.S. at 260).[4] *See also Beverley* v.

4. The Seventh Circuit's decision below, which did not cite to the opinion of its district court in *Carpenter*, is not easily reconciled with *Carpenter* and its proper analysis of the law in this area.

Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984) (Title VII claim accrued after final review by Board of Governors where earlier decisions of three other bodies best understood in context as recommendations); *Linn* v. *Andover Newton Theological School*, 642 F. Supp. 11 (D. Mass. 1985) (ADEA claim did not accrue at time faculty member received president's letter offering one-year terminating contract when analyzed in light of published Faculty Promotion and Tenure Policy).

To properly affirm the district court's holding that Professor Lever actually knew that the Dean held the final decision-making authority, the Court of Appeals was required to review the facts concerning Professor Lever's actual knowledge upon which the district court relied. The Seventh Circuit failed to undertake this inquiry and therefore did not conduct the required review of the district court's actual finding. The court mentioned in passing one fact that may have influenced the district court's decision on actual knowledge,[5] but never undertook a thorough review of the facts upon which both the district court and the special master relied in finding actual knowledge — a review which is necessary to support such a factual finding on appeal. *See*

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5. In discussing the testimony of the Dean and the Provost, the court noted: "[T]he district court concluded that Lever knew [the Dean's decision was final] — which *may* explain why, when filing a charge with the EEOC, she characterized as the discriminatory decision not the Provost's letter [denying tenure], but the Dean's letter [to the same effect reiterating his earlier decision to recommend against tenure]." 979 F.2d at 555 (emphasis supplied). (App. A-6) Rather than demonstrating that Professor Lever knew that the Dean's May 1980 letters constituted final notice of an adverse tenure decision, this evidence forcefully demonstrates that Professor Lever believed Provost Mack when he told her that until Dean Weingartner completed his reconsideration of her candidacy, the tenure decision was still pending and therefore nonappealable.

Dennison Manufacturing Co. v. *Panduit Corp.*, 475 U.S. 809, 811 (1986) (circuit court's opinion vacated and remanded because that court did not "explicitly apply the clearly-erroneous standard" to the district court's factual findings). Instead, the court below concluded that evidence as to the ambiguous nature of the notice provided by Northwestern to Professor Lever — evidence relevant to a finding of constructive knowledge — somehow supported the district court's conclusion that Professor Lever had actual knowledge of the finality of the Dean's decision. *Lever*, 979 F.2d at 557 (App. A-10).

B. The Seventh Circuit's Opinion is Inconsistent with This Court's Decision in *Ricks* and with the Intent of Congress

The Seventh Circuit's opinion below conflicts not only with decisions of other courts of appeals, but also with the language and ruling of *Ricks* itself. The court of appeals' decision in the instant case compromises *Ricks*' critical admonition that "the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 765 n.13 (1979); *Love* v. *Pullman*, 404 U.S. 522, 526 (1972).

The Seventh Circuit's opinion is at war with this principle. The decision below allows inconsistencies between stated policies and actual conduct to bar otherwise valid claims because employees may not appreciate the significance of their employer's actions until after the short period of limitations has run.

The *Ricks* decision did not condone this practice and Congress did not intend it. *Ricks* requires that notice of a

final adverse employment decision must be "made and communicated" to an employee before any employment discrimination claims based on that decision accrue. This is the judicial understanding of Congress' assertion in Title VII that an employment discrimination claim accrues when "the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e); *see Ricks*, 449 U.S. at 259. In practical terms, this means that employment discrimination claims accrue as late as necessary to ensure that the employee received unequivocal notice that the challenged employment decision had been made final. Once the claim has actually accrued, Congress provided aggrieved persons the relatively short period of 180 or 300 days in which to file a complaint with the EEOC. It is through the combination of the clear accrual date and the short period of limitations that Congress expressed its "'value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Ricks*, 449 U.S. at 260 (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975)). *Ricks* gave effect to this value judgment by refusing to countenance Ricks' assertion that his claim should have accrued not when the decision to deny him tenure was finally made and communicated but when, thereafter, he was actually terminated.

The decision below has dangerously distorted *Ricks*' recognition that Congress intended employment discrimination claims to accrue when the alleged unlawful employment practice occurred and to become stale a relatively short time thereafter. It does so by holding that Professor Lever's claim accrued at a time when it was not clear that the allegedly unlawful decision to deny her tenure was final and had been communicated to her unequivocally and with certainty. It does so by asserting:

> Doubtless courts should consider the effects of uncertainty. Still, a legal rule starting the time on the latest possible date cuts against the grain of *Ricks* and other decisions we are bound to follow. Congress chose a short period of limitations for employment discrimination cases, providing employers with a valuable entitlement offsetting the portions of Title VII that assist employees . . ..

Lever, 979 F.2d at 554. (App. A-3-A-4) The court below thus disregards the uncertainty created by Northwestern's tenure denial process and disregards the *Ricks* admonition that "the limitations periods should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." 449 U.S. at 262 n.16.

Only recently, Congress reaffirmed its intent that accrual dates not be allowed to thwart an individual's invocation of the protections afforded by the civil rights statutes. On November 21, 1991, the Civil Rights Act of 1991 became effective. Among the numerous changes to pre-existing law brought about by the 1991 Act was an amendment to section 706(e) of Title VII.

Through the amendment, found at section 112 of the 1991 Act, Congress explicitly overruled this Court's decision in *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989). *See* 137 Cong. Rec. H9530 (Nov. 7, 1991); 137 Cong. Rec. S15485 (Oct. 30, 1991). In *Lorance*, this Court held that "when a seniority system is nondiscriminatory in form and application, it is the allegedly discriminatory adoption which triggers the limitations period" of section 706(e). 490 U.S. at 911. The *Lorance* decision effectively required all employees to file anticipatory Title VII claims in respect of the alleged discriminatory adoption of a seniority system "even if the employee who . . . challenges that system could not reasonably . . . expect to be demoted or otherwise concretely harmed

by the new system at the time of its adoption . . .." *Lorance*, 490 U.S. at 913-914 (Marshall, J., dissenting). As it developed, even employees not working in the division of a company to which a seniority system applied at the time of the adoption of the discriminatory system would have to file such anticipatory lawsuits in order to avoid losing their claims. If the employees waited to file suit until they actually became subject to the system or were actually injured by its application to them, the suit might be time barred.

Section 112 of the 1991 Civil Rights Act overruled *Lorance* by providing that a Title VII claim with respect to seniority systems may accrue "when a person aggrieved is injured by the application of the seniority system . . .." 105 Stat. 1078-79. In expressly overruling *Lorance*, the 102nd Congress made it abundantly clear that an employee should not have to guess or speculate or be left in doubt as to the occurrence of an employer's discriminatory act. In the teeth of this clearly renewed expression of Congress' value judgment in this area, the court below has nonetheless imposed on employees precisely such a burden of clairvoyance if they are not to lose the chance to vindicate their civil rights claims. If the Seventh Circuit's approach is adopted, if vague and ambiguous policies of employers are allowed to substitute for a final decision unequivocally communicated as such to an employee, Congress' intent and this Court's ruling in *Ricks* will be turned on their heads.

In short, review of the decision of the Seventh Circuit herein will permit the Court to issue a ruling that prevents the erosion of its *Ricks* decision, harmonizes the decisions of the courts of appeals, furthers the objectives of the federal civil rights statutes, and denies employers the opportunity to defeat discrimination claims before they are adjudicated on the merits by creating systemic, institutionalized uncertainty regarding employment decisions and then using that uncertainty to erect statutes of limitations defenses.

CONCLUSION

For the reasons stated above, petitioner Janet Lever requests the Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Seventh Circuit.

Dated: New York, New York
April 8, 1993

Respectfully submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 91-3571

JANET LEVER,

Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, *et al.*,

Defendants-Appellees.

Argued Oct. 23, 1992.

Decided Nov. 9, 1992.

Leonard L. Cavise, Chicago, Ill., argued, for plaintiff-appellant Janet Lever.

Lawrence I. Kipperman (argued), Patrick S. Casey, Sidley & Austin, Chicago, Ill., Martha P. Mandel, Evanston, Ill., for defendant-appellee Northwestern University.

Lawrence I. Kipperman, Patrick S. Casey, Sidley & Austin, Chicago, Ill., for defendants-appellees Raymond Mack and Rudolph Weingartner.

Gwendolyn Young Reams, Carolyn L. Wheeler, Donald R. Livingston, Susan Starr (argued), E.E.O.C. Office of Gen. Counsel, Washington, D.C., for amicus curiae E.E.O.C.

Ann Franke, Mark D. Laponsky, Washington, D.C., for amicus curiae American Ass'n of University Professors.

Before BAUER, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and WOOD, JR., *Senior Circuit Judge*.

EASTERBROOK, *Circuit Judge*.

Janet Lever, an assistant professor of sociology at Northwestern University, was considered for tenure during the 1979-80 academic year, her sixth with the University. Her department unanimously recommended promotion to associate professor, but the Committee on Promotions and Tenure of the College of Arts and Sciences fell one vote short of the two-thirds needed to recommend tenure. On May 5, 1980, Rudolph Weingartner, Dean of the College, wrote to Lever: "I am sorry that I must inform you that I shall not recommend to the Provost that you be promoted to the rank of associate professor. I therefore offer you a final year at Northwestern as assistant professor of sociology, terminating August 31, 1981."

Despite reviews and re-reviews, the Dean adhered to his decision, and on February 12, 1981, Provost Raymond Mack wrote Lever that "I do not feel that I am justified in reversing the decision of the Dean not to recommend your promotion to tenure at Northwestern University." On June 15, 1981, Lever filed with the EEOC a charge that Northwestern discriminated against her because she is female. Illinois is a "deferral" state, so Lever had 300 days from the discriminatory act to file a charge. 42 U.S.C. § 2000e-5(e). The charge is timely if measured from the Provost's letter, but not if measured from the Dean's. For eleven years, the parties have been locked in combat about which letter started the time. After receiving the report of magistrate judge Weisberg, 1991 U.S.Dist. LEXIS 15311, who held a two-day trial as a special master, the

district judge concluded that the Dean's decision was definitive, with later steps merely appeals and requests for review. 1991 WL 206066, 1991 U.S.Dist. Lexis 14353. Under *Delaware State College* v. *Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), neither appeals nor a deferred final date of employment postpone the time within which the employee must make a charge.

Time starts to run with "the *discriminatory* act, not the point at which the *consequences* of the act become painful." *Chardon*, 454 U.S. at 8, 102 S.Ct. at 29 (emphasis in original). See also *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 449-50 (7th Cir.1990). When the discriminatory act occurs, no less than whether a given act was discriminatory, is a question of fact. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Mucha v. King*, 792 F.2d 602 (7th Cir.1986). An appellate court's role in reviewing decisions reached after trial is correspondingly small. The question is not whether we would have agreed with the district judge's decision were we the triers of fact, but whether the district judge's decision is clearly erroneous. Fed.R.Civ.P. 52(a); *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-76, 105 S.Ct. 1504, 84 L.Ed.2nd 518 (1985). Lever presents arguments that might have swayed the trier of fact but did not.

Northwestern's rules shroud the identity of the decision-maker. Lever (joined by the EEOC and the American Association of University Professors as *amici curiae*) contends that ambiguity necessitates generosity — that the court should choose the last of the plausible dates, to preserve the claims of persons who believe that they are victims of discrimination. Doubtless courts should consider the effects of uncertainty. Still, a legal rule starting the time on the latest possible

date cuts against the grain of *Ricks* and other decisions we are bound to follow. Congress chose a short period of limitations for employment-discrimination cases, providing employers with a valuable entitlement offsetting the portions of Title VII that assist employees, and courts may not second-guess that decision. No rule of law says that employees win all close cases. Accordingly, we have a factual rather than a legal question, and in an appellate court factual ambiguity ensures affirmance: it means that the district judge's choice is not clearly erroneous. Lever's contention that all debatable questions about timeliness should be resolved in favor of the plaintiff is in the end either a plea to abandon the "clearly erroneous" standard when the district judge has ruled in favor of the employer or an expression of disagreement with *Chardon* and *Ricks*.

Did the Dean make a recommendation (as Lever believes) or a decision (as the district court concluded)? To put this differently, did the Dean recommend that Lever not be promoted, or did he decide not to recommend her promotion? His letter of May 5 reads more like a decision, an interpretation fortified by the offer of a terminal contract. That concrete act smacks of finality. You would expect such a contract and a decision to go together. On this understanding, the Dean had the power to conclude the matter adversely to a faculty member, but a final decision in favor of tenure required the approval of the Provost (and ultimately the Board of Trustees).

To be sure, one could believe that Northwestern gave the Dean only a power to recommend in either direction. Page 10 of the handbook for faculty in Northwestern's College of Arts and Sciences provided:

> A decision by the Dean to recommend against the granting of tenure leads to an offer of a terminal year. . . . When the Dean sends the Provost a negative recommendation about a candidate, the Dean invites the candidate to a private meeting in order to discuss the reasons for the negative recommendation. If, after that meeting, the candidate writes to the Dean requesting a written statement of those reasons, the Dean writes such a statement. The Dean's recommendations are subject to review by the Provost. A candidate's appeal from a recommendation by the Dean is addressed to the University Faculty Reappointment, Promotion, and Tenure Appeals Panel. The procedure is outlined in the *NU Faculty Handbook*, pages 13-14.

Page 13 of the faculty handbook said that:

> [T]he dean of a school may decide to recommend against reappointment, promotion or tenure for a faculty member. . . . [The faculty member] may, within six months from the date of initial notification, file an appeal with the University Faculty Reappointment, Promotion, and Tenure Appeals Panel. He must at the same time notify the Provost that he has filed such an appeal. Upon receiving this notification, the Provost will defer his own decision on the matter until he has received the recommendation of the University Faculty Reappointment, Promotion, and Tenure Appeals Panel.

One could read these passages as saying that the Dean does nothing but recommend, leaving the decision to the Provost. Yet one also could read them as giving the Dean's "negative

recommendation'' the status of a final decision (hence the terminal contract), subject only to an ''appeal'' to a committee and ''review'' by the Provost. Then the Dean's decision is final in the same sense as a judgment of a district court: it is self-effectuating and stands unless reversed, which can occur only on a request for review.

Testimony by the Dean and the Provost led the district court to conclude that the Dean's decision was indeed self-effectuating, as the award of the terminal contract implies. The Provost testified that he never saw the file unless the faculty member appealed. More, the district court concluded that Lever knew this to be so — which may explain why, when filing a charge with the EEOC, she characterized as the discriminatory decision not the Provost's letter of February 12, 1981, but the Dean's letter of January 15, 1981, reiterating his letter of May 5, 1980.

Lever falls back to an argument that the Dean rescinded his own decision in May 1980, making his letter of January 15, 1981, the ''real'' initial action. Both Lever and the Sociology Department protested the Dean's action of May 5. After receiving a delegation of disgruntled sociologists, the Dean, a philosopher, wrote to the Chairman of the Sociology Department on May 14, 1980:

> Your request [that I reconsider] has led me to spend considerable additional time in reading Miss Lever's promotion dossier . . . and in reflecting on her case. These considerations have not enabled me to find sufficient ground to counter the recommendations of the CAS Promotion and Tenure Committee, so as now to recommend Miss Lever's promotion to the Provost. These same considerations have, however, led me to conclude with some clarity that the issue of Miss

> Lever's promotability at Northwestern . . . rests above all on the quality of her unfinished manuscript, *Soccer in Brazil* — in itself and as a sign of the nature of her future work. . . .
>
> My letter to Miss Lever of May 5 continues to constitute formal notice to the effect that the academic year 1980-81 will be her terminal year at Northwestern. If the final draft of the manuscript in question, *Soccer in Brazil*, is completed by November 1, 1980 and submitted to the Dean's Office by that date, I will undertake to have a further evaluation made of [it]. On the basis of the information I receive in this way, I will either reverse or confirm my recommendation to the Provost.

Lever submitted the manuscript on time. (It was published in 1984, as *Soccer Madness*, by the University of Chicago Press.) As he promised, the Dean obtained evaluations of the manuscript. They were not sufficiently favorable, and the Dean adhered to his decision. (The delay made it hard for Lever to secure appointment elsewhere for the 1981-82 academic year, so the Dean extended her terminal contract through August 31, 1982.) The Provost backed up the Dean in February 1981. Lever appealed to the Faculty Reappointment, Promotion, and Tenure Appeals Panel in April 1981. The Panel's adverse decision came in February 1982.

Lever's contention that the Dean's willingness to receive further evidence rescinded his decision of May 5 is inconsistent with the Dean's own description, in the letter of May 14, of the effect of his undertaking: "My letter to Miss Lever of May 5 continues to constitute formal notice to the effect that the academic year 1980-81 will be her terminal year at Northwestern." It may well be that Lever did not want to cry

"discrimination!" while there was still an opportunity to obtain a favorable decision from the University. But Professor Ricks had the same legitimate concern, explaining that he did not want to commence adversarial proceedings until the College's Board of Trustees had acted on his request for reconsideration. The Court replied: "It is true that 'the filing of a lawsuit might tend to deter efforts at conciliation.' *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S.[454] at 461 [95 S.Ct. 1716 at 1720, 44 L.Ed.2d 295 (1975)]. But this is the 'natural effect of the choice Congress has made,' *ibid.*, in explicitly requiring that the limitations period commence with the date of the 'alleged unlawful employment practice,' 42 U.S.C. § 2000e-5(c)." *Ricks*, 449 U.S. at 259 n. 11, 101 S.Ct. at 505 n. 11. If the Dean was holding Lever's sex against her, the unlawful practice occurred on May 5, 1980, when the Dean turned her down for promotion.

An employer's refusal to undo a discriminatory decision is not a fresh act of discrimination. If it were, then an employee could avoid the 300-day limit by filing a series of appeals or fresh requests; *Ricks* and *Chardon* hold that adverse decisions on appeals do not re-start the time for filing a charge. See also, e.g., *Malhotra* v. *Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989). Lever's situation is well removed from *Webb* v. *Indiana National Bank*, 931 F.2d 434 (7th Cir. 1991), in which a person applied for jobs with the same employer, was turned down twice, and filed a charge after the second denial. We held that the applicant was entitled to an opportunity to show that the second decision was independent of the first, in which case she could challenge the second (and only the second) decision. An applicant does not have to sue about the first wrong to be entitled to contest a second. Cf. *Selan* v. *Kiley*, 969 F.2d 560, 563- 67 (9th Cir. 1992). But when the first decision is connected to and implies the second — when, in

other words, a single discriminatory decision is taken, communicated, and later enforced despite pleas to relent — the time starts with the initial decision. *Webb*, 931 F.2d at 437 (distinguishing two *ad hoc* decisions from a "permanent exclusion" such as "a denial of tenure").

At last we come to Lever's contention that Northwestern is equitably estopped to assert the statute of limitations and that the time is also equitably tolled. Equitable estoppel arises, we held in *Cada*, 920 F.2d at 450-51, when the employer "takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." Equitable tolling, by contrast, comes into play "if despite all due diligence [the employee] is unable to obtain vital information bearing on the existence of his claim." *Id.* at 451. Nothing in Northwestern's avenues of redress kept "vital information" out of Lever's hands; if the Dean's decision is best explained by her sex rather than her scholarship, that was equally apparent on May 5, 1980, and January 15, 1981. An employer need not proclaim its bias as a precondition to the start of the period of limitations. As for equitable estoppel: Northwestern did nothing to dissuade Lever from filing a charge. True, it offered many forums for persuasion, and Lever's desire to pursue these with a minimum of friction likely explains her delay (although Lever could have had her cake and eaten it too: 17 of the 300 days remained on February 12 1981, when the Provost said no). To treat such opportunities as a source of equitable estoppel would reverse the Court's conclusion in *Ricks* and *Chardon* that appeals and requests for reconsideration do not permit delay.

Lever's strategy is to depict the opportunities as snares for the unwary. When the Dean wrote on May 14 that he would take a new look at things if she submitted her manuscript by November 1, Lever became concerned that this might

interfere with her appeal to the Faculty Reappointment, Promotion, and Tenure Appeals Panel, which had to be initiated within six months of the Dean's decision. She went to see Provost Mack, himself a sociologist. Mack assured her that he would see to it that the Panel considered any appeal filed promptly after the Dean's decision on reconsideration. Mack was true to his word, insisting that the Panel convene and decide even though Lever's eventual appeal was technically late. What Mack said yields a classic case for equitable tolling — of the time limit to appeal to the Panel, not the limit to file a charge with the EEOC. Mack said nothing about the EEOC and hadn't an inkling that Lever was contemplating such a step. Excessive kindness in providing many and varied opportunities for internal review is not the sort of deception that supports equitable estoppel. It certainly does not compel a conclusion that the district judge abused her discretion.

Northwestern could do its faculty (and the courts) a favor by writing accurate descriptions of its procedures. The handbooks are vague and can be understood to describe steps inconsistent with the process that, according to both Dean and Provost, Northwestern actually follows. Professors can cope with some ambiguity, however; anyone able to obtain a Ph.D in sociology has read (or written) much worse. The district court found that the Dean had, and exercised, the authority to terminate a career at Northwestern — and that Lever knew it. That conclusion is not clearly erroneous.

AFFIRMED

EXHIBIT B

B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 84 C 11025

JANET LEVER,

Plaintiff,

v.

NORTHWESTERN UNIVERSITY; RAYMOND MACK, Provost; RUDOLPH WEINGARTNER, Dean, College of Arts and Sciences,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Janet Lever brought this action against defendant Northwestern University (''Northwestern''), et al., for sex discrimination in employment in violation of Title VII, 42 U.S.C. § 2000e *et. seq*. More specifically, the plaintiff contended that Northwestern, through defendants Raymond Mack, former Provost of the University, and Rudolph Weingartner, Dean of the College of Arts and Sciences, wrongfully refused to grant her tenure. The defendants moved to dismiss the case, claiming that the plaintiff failed to file her complaint within the requisite time period.

The Court referred this matter to Magistrate Judge Weisberg for a report and recommendation. The Magistrate Judge,

in a thorough and well reasoned report, recommended that the defendant's motion to dismiss be granted. For the reasons stated below, the Court adopts the Magistrate Judge's report and recommendation.

Facts

The facts of this case were fully explained in the Magistrate Judge's report and recommendation. For purposes of this opinion, a brief summary of the facts is necessary. At Northwestern, a faculty member normally is considered for tenure after a fixed number of years of teaching under one or more term contracts. If tenure is not granted, the faculty member normally is required to leave the university.

The tenure application process includes several steps at Northwestern. The candidate's tenured colleagues in her department first make a recommendation to the Dean of the College of Arts and Sciences. If the recommendation is positive, the Dean appoints an *ad hoc* committee of other tenured faculty members to evaluate the candidate. Following submission of the *ad hoc* committee's report, the Promotions and Tenure Committee (''PATC'') reviews the candidate's file and submits its recommendation to the Dean.

The Dean then determines whether to recommend to the Provost, whose approval is required for a grant of tenure, whether the candidate should receive tenure. If the Provost recommends the grant of tenure, the Board of Trustees, in what is considered merely a formality, must approve the grant of tenure. Successful candidates are notified when the Provost approves the recommendation for tenure.

Northwestern hired Lever as an assistant professor in the Sociology Department, a division of the College of Arts and Sciences, in 1974. In the academic year 1979-80, Lever

became eligible for a promotion to associate professor with tenure. The tenured faculty of the Sociology Department unanimously recommended that she receive tenure. The *ad hoc* committee also recommended tenure, but with reservations. The PATC, however, fell one vote short of the number necessary to give a favorable recommendation. On May 5, 1980, Dean Weingartner wrote Lever to tell her that he would not recommend to the Provost that she receive tenure. In accordance with Northwestern's policy, Weingartner offered her a final year of employment terminating on August 31, 1981.

Upset with the Dean's determination, the Sociology Department convinced Weingartner to reconsider Lever's candidacy. After his initial reconsideration of her file, Weingartner wrote Lever to tell her that, while his initial decision to terminate her employment as of August 31, 1981 still stood, he nevertheless would reconsider her candidacy if she submitted a final draft of her unfinished manuscript, *Soccer in Brazil*, by November 1, 1980.

Although Lever accepted the offer of terminal year employment for 1980-81, she became concerned that the extended reconsideration might cause her to lose her right to appeal her adverse tenure decision. She had six months from her notification by the Dean that she had not received tenure to file an appeal with the University Faculty Reappointment, Promotion, and Tenure Appeals Panel (''UFRPTAP''), the committee which considers such complaints. Lever approached Provost Mack for advice. He suggested that she not file an appeal until after Weingartner had completed his reconsideration, and gave his word that a subsequent appeal would not be untimely.

After consideration of the manuscript which Lever submitted to Weingartner on November 1, 1980, Weingartner decided not to reverse his decision not to recommend Lever for tenure. He advised Lever of this decision on January 15, 1981. Lever requested that the Provost overrule the Dean's decision, but he declined to do so. Lever then filed an appeal with UFRPTAP.[1] On February 16, 1982, UFRPTAP did not recommend overturning the decision. Lever's employment terminated on August 31, 1982.

The Timeliness Issue

In order to assure that her Title VII claim was not time barred, plaintiff Lever had to file her charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days after she received notice of the alleged unlawful employment practice. The Magistrate Judge's report accurately states that the determination of when the alleged unlawful employment practice occurred, the central question for deciding the timeliness issue here, is governed by the Supreme Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Having decided that the plaintiff only alleged that his denial of tenure constituted an unlawful employment practice, the Court in *Ricks* held that the limitations period began to run at the time the tenure decision was made and communicated to the plaintiff. *Id.* at 258.

---

1. The UFRPTAP's review of Lever's case was delayed due to administrative complications. The plaintiff received an extension on her contract in the interim.

Magistrate Judge Weisberg found, and the Court agrees, that the tenure decision in this case was made and communicated to the plaintiff by Weingartner in his letter on May 5, 1980. Lever, in her objections to the Magistrate Judge's report and recommendation, challenges this determination because she claims that Weingartner's action did not constitute a definite and final decision. Based upon her reading of *Webb* v. *Indiana National Bank*, 449 U.S. 250 (1980), the plaintiff asserts that the Dean's letter was merely a tentative decision. She bases this argument primarily on Weingartner's reconsideration of her candidacy within nine days of the letter.

However, the Magistrate Judge properly highlights several factors which support his conclusion that the Dean's decision was final. For example, the Magistrate Judge notes that the College of Arts and Science's Faculty Handbook specifically states that the Dean's decision not to recommend a grant of tenure leads to an offer of a terminal year. As this Court previously stated, "The person who has the authority to offer an 1-year terminal contract must have the authority to make a final tenure decision." Feb. 5, 1990 Mem. Opinion and Order at 6. Furthermore, Lever's testimony amply demonstrates that she knew she had been turned down for tenure after she received the Dean's letter dated May 5, 1980. Finally, the Dean's letters, on May 5, 1980 and May 14, 1980 clearly conveyed to the plaintiff that the Dean had made a final decision. Most notably, the May 5 letter stated that it consituted formal notice that Lever's employment would terminate on August 31, 1981, and the May 14 letter stated that Weingartner's May 5 decision to deny tenure was not rescinded and remained in effect until and unless it was changed upon reconsideration of her candidacy.

The facts and the Court's decision in this case are analogous to *Rodriquez* v. *Chandler*, 641 F.Supp. 1292 (S.D.N.Y. 1986). In *Rodriquez*, the college offered to reconsider its prior decision to deny the plaintiff tenure and make its terminal year appointment if the plaintiff obtained a doctoral degree by a specified date. *Id.* at 1295. Although the plaintiff had completed his dissertaton by the time of the review of his candidacy, the college did not overturn its decision. *Id.* Following the Supreme Court's decision in *Ricks*, the Rodriguez Court held that the Title VII limitations period began to run on the plaintiff's claim when the college first notified the plaintiff of his terminal year appointment, rather than when he received the subsequent notice that, upon reconsideration, his request for tenure still was denied. *Id.* at 1296.

Like the plaintiff in *Rodriguez*, Lever's denial of the finality of Weingartner's May 5 decision is without substance. As already noted, the termination decision, by its terms, was unequivocal, and the plaintiff was clearly informed that the Dean's decision was final, regardless of whether he reopened her file upon submission of her completed manuscript. Furthermore, the fact that the Dean eventually reconsidered his determination does not alter the Court's decision. As the controlling case, *Ricks*, states, requests for reconsideration ". . . cannot extend the limitations periods applicable to the civil rights laws." *Ricks*, 449 U.S. at 261 n.15.[2] Hence, the Court

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2. The plaintiff's reliance upon the Third Circuit's determination in *Colgan* v. *Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir. 1991), is unfounded. Relying upon *Colgan*, the plaintiff asserts that to have required her to file an earlier appeal could have caused unnecessary friction in her employment relationship because Northwestern still was considering her application for tenure. However, *Ricks* clearly states that this factor should not alter the determination of when the limitations period begins to run. 449 U.S. at 259 n.11. While an adverse effect of an appeal upon the reconsideration of a tenure decision would be unfortunate, the Supreme Court

adopts the Magistrate Judge's report and recommendation regarding the timeliness of the plaintiff's claim.

Further Discriminatory Acts

In *Ricks*, the Supreme Court clearly stated that the determination of the timeliness of the plaintiff's complaint required the precise identification of the complained unlawful employment practice. 449 U.S. at 257. Magistrate Judge Weisburg fulfilled this requirement by concluding that the plaintiff's allegation of her wrongful denial of tenure constituted the unlawful employment practice at issue in this case. Based upon this finding, the Magistrate Judge correctly determined that since the denial of tenure constituted the only discriminatory act at issue, no continuing violation of the plaintiff's civil rights or further discriminatory acts could have occurred.

The plaintiff contends that this determination was beyond the scope of the timeliness issue. She claims that consideration of the merits of her discrimination charge was not necessary to the Magistrate Judge's determination of the timeliness of her filing of her complaint. However, because *Ricks* requires that the Magistrate Judge determine when the unlawful employment practice occurred, the Magistrate Judge's assessment of what the plaintiff alleges are further discriminatory acts was within the scope of his charge. The Magistrate Judge's failure to address the later alleged actions would only have led to confusion regarding the date he considered

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has held that the limitations period must nevertheless commence with the date of the alleged unlawful employment practice. *Id.*

appropriate from which to begin counting the limitations period.

Furthermore, the Magistrate Judge's assessment of the merits of the further discriminatory acts alleged is correct. The Magistrate Judge properly determined that the alleged further discriminatory acts were not independent of Lever's denial of tenure. Such acts as Weingartner's May 14, 1980 letter refusing to reverse his decision and Mack's subsequent unwillingness to overturn Weingartner's decision were closely related to Lever's claim that they wrongfully denied her tenure. The plaintiff, in her objections to the Magistrate Judge's report or her brief in support of her objections, has failed to offer any argument to the contrary. At most, the Northwestern officials' actions were responses to Lever's attempts to appeal her adverse tenure decision. As already noted, the Supreme Court has concluded that requests for reconsideration cannot extend the limitations period applicable to civil rights laws. *Ricks*, 449 U.S. at 261 n.15.

In addition, the Magistrate Judge properly determined that the differences in Lever's tenure decision from other professors' tenure decision were not necessarily discriminatory. The Supreme Court clearly has stated that the plaintiff ". . . would have had to allege and prove that the manner in which his [or her] employment was terminated differed *discriminatorily* from the manner in which the College terminated other professors who also had been denied tenure." *Id.* at 258 (emphasis added). The plaintiff has not fulfilled this burden. As the Magistrate Judge found, the plaintiff merely asserted that her termination differed from that of other professors, rather than demonstrating that these differences were discriminatory. Therefore, the plaintiff's objection to the Magistrate Judge's report based upon this contention fails.

Equitable Tolling and Equitable Estoppel

The Magistrate Judge also correctly determined that exceptions to the established limitations period, namely equitable estoppel and equitable tolling, should not affect this Court's conclusion that this case is time-barred. Equitable estoppel applies when a defendant's actions prevent a plaintiff from bringing a claim within the applicable limitations period. The Seventh Circuit, in *Cada* v. *Baxter Healthcare Corp.*, recently declared that a plaintiff must allege active steps by the defendant, ". . .—above and beyond the wrongdoing upon which the plaintiff's claim is founded—[that] prevent the plaintiff from suing in time." 920 F.2d 446, 451 (7th Cir. 1990).

As the Magistrate Judge concluded, Lever has failed to allege sufficiently egregious acts and intentional acts requiring the invocation of the equitable estoppel doctrine. The plaintiff counters that Northwestern "dragged out the procedures" to give her the impression that her case still was at issue and therefore, she would not to file [sic] a claim with the EEOC. However, nothing suggests that the Northwestern officials involved in her tenure decision acted improperly. The Court agrees with the Magistrate Judge that Weingartner had, and Lever knew he had, the authority to deny her tenure, and that Weingartner's May 5 letter clearly informed her that he had made a final tenure decision.[3] Hence, Lever could not

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3. In fact, the Northwestern officials actions which the plaintiff claims "dragged out the procedure" at most constituted actions in furtherance of the reconsideration of her tenure candidacy which Lever encouraged. The Court reiterates that the Supreme Court clearly has determined that requests for reconsideration cannot extend the limitations period. *Ricks*, 449 U.S. at 261 n.15.

have been under the impression that her adverse tenure decision did not entitle her to file a claim with the EEOC.

The plaintiff also contends that the Provost's advice to wait to file an appeal constituted an active step to discourage her from filing her claim within the applicable limitations period. Once again, the Court agrees with the Magistrate Judge's conclusion that the Provost's advice did not rise to the level required to invoke the equitable estoppel doctrine on plaintiff's behalf. Regardless of whether Mack gave her incorrect advice, he did not mislead her as to the necessary filing dates with the EEOC. He also did not mislead her regarding the finality of Weingartner's decision. Hence, the application of equitable estoppel in this instance would be inappropriate.

The application of equitable tolling also would be inappropriate. Equitable tolling is employed when a plaintiff, not necessarily through the fault of the defendant, cannot obtain information necessary to decide whether her injury is due to wrongdoing. *Cada*, 920 F.2d at 450-451. The Magistrate Judge correctly determined that Lever alleged no facts showing that she was unable to obtain information vital to her discrimination claim during the 300 day limitations period applicable to her case. Statutes of limitations promote important social interests in certainty, accuracy, and repose. *Id.* at 453. Thus, where, as in this case, the plaintiff provides no valid argument in support of her need for equitable tolling, the Court will not unnecessarily deprive the defendant of the protection of the statute of limitations bar. Therefore, the Court refuses to toll the applicable period.

Conclusion

For the reasons stated above, the Court adopts the Magistrate Judge's report and recommendation, and dismisses the plaintiff's complaint. For purposes of appeal, time begins to run from the date that this memorandum opinion and order was entered.

ENTER:

/s/ ANN CLAIRE WILLIAMS
Ann Claire Williams, *Judge*
United States District Court

Dated: OCT 4 1991

EXHIBIT C

C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 84 C 11025

JANET LEVER,

Plaintiff,

v.

NORTHWESTERN UNIVERSITY; RAYMOND MACK, Provost; RUDOLPH WEINGARTNER, Dean, College of Arts and Sciences,

Defendants.

SPECIAL MASTER'S REPORT ON TIMELINESS OF CHARGE

This is an action for sex discrimination in employment in violation of Title VII, 42 U.S.C. § 2000e *et seq.* Plaintiff Janet Lever, a former assistant professor at Northwestern University, has challenged Northwestern's refusal, through defendants Raymond Mack and Rudolph Weingartner, formerly Provost and Dean of the College of Arts and Sciences respectively, to grant her tenure. The parties dispute who made the tenure decision and when it was made. Northwestern claims that the decision was made by Weingartner and communicated to Lever in a letter dated May 5, 1980. If so, Lever's EEOC charge filed on June 16,

1981 was untimely.[1] Lever claims that the true date of the decision was either January 15, 1981, the date when Weingartner after reconsideration decided not to change his decision, or February 12, 1981 when Mack, who had final authority in tenure matters, completed his review and upheld it. Alternatively, assuming that the decision was made by Weingartner in May 1980, Lever puts forward several reasons why her delay in filing should be excused.

In a memorandum opinion dated February 5, 1990, Judge Williams ordered a separate hearing on the timeliness issue pursuant to Rule 42(b), Fed. R. Civ. P. That issue was subsequently referred to the undersigned acting as a special master pursuant to 42 U.S.C. § 2000e-5(f)(5) and Rule 53, Fed. R. Civ. P. A trial was conducted on August 1 and 2, 1990 and the parties have submitted proposed findings of fact and conclusions of law.

Lever's Tenure Decision

At Northwestern, as at most universities, professors are employed either under fixed-term contracts or as tenured faculty having an indefinite term of appointment. Tenure virtually assures lifetime employment, since a tenured faculty member can be removed only for serious misconduct or neglect of duty. A faculty member is normally considered for

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1. The parties agree that under 42 U.S.C. § 2000e-5(e) a charge in this case was required to be filed within 300 days of the unlawful employment practice giving rise to the claim of discrimination.

tenure after a fixed number of years of teaching under one or more term contracts. If tenure is not granted, she is normally required to leave the university.

In 1980 Lever had been employed by Northwestern since 1974 as an assistant professor in the Sociology Department, a division of the College of Arts and Sciences. The 1979-80 academic year was her sixth year of teaching and she was eligible for promotion to associate professor with tenure. The process of awarding tenure in the College of Arts and Sciences begins with the recommendation of the candidate's tenured colleagues in her department. If that recommendation is positive, the Dean appoints an *ad hoc* committee of tenured faculty members from other departments to evaluate the candidate. The committee solicits opinions of the candidate's work from recognized scholars in the candidate's field at other institutions and asks students about the candidate's teaching.

The *ad hoc* committee reports to the Promotions and Tenure Committee (PATC). The candidate's department chairperson may read the report, and a delegation from the candidate's department may be invited to appear on the candidate's behalf. After reviewing the candidate's file, including the comments of the external referees and the *ad hoc* committee report, the PATC then votes on the candidate and sends its recommendation to the Dean. College of Arts and Sciences (CAS) Faculty Handbook at 8-9, Jt. Ex. 10.

The Dean then decides whether to recommend to the Provost, the chief academic officer of Northwestern, that the candidate receive tenure. Although the Dean has the power to hire untenured faculty, Tr. 162, 248-51, the Provost's recommendation is required for a grant of tenure. Tr. 162, 169. Occasionally the Provost disagrees with the Dean's

recommendation and does not recommend tenure, and occasionally he recommends for tenure someone not recommended by the Dean.

If the Provost recommends a grant of tenure, that recommendation is passed through the president's office for action by the Board of Trustees. Approval by the trustees is only a formal step. Successful candidates are notified when the Provost approves the recommendation; as Provost, Mack had never known the trustees to reject his recommendation. Tr. 169.

In October 1979 the tenured faculty of the Sociology Department unanimously recommended to Weingartner, then Dean of the College of Arts and Sciences, that Lever be granted tenure. Pretrial Order (PTO) Stip. ¶ 7. An *ad hoc* committee unanimously recommended, although with reservations, that she be given tenure. *Id.* ¶ 8. On April 28, 1980 a vote of the College's Promotions and Tenure Committee fell one vote short of the two-thirds majority necessary for a favorable recommendation. *Id.* ¶ 9. On May 5, 1980 Weingartner wrote Lever telling her that he would not recommend to the Provost that she be promoted and given tenure. In accordance with Northwestern's policy, Weingartner offered her a final year of employment terminating August 31, 1981. *Id.* ¶ 10. Jt. Ex. 1.

Thus far, it is agreed that the evaluation of Lever's candidacy proceeded in accordance with established practice. But thereafter Lever's case left the well-worn road travelled by most disappointed aspirants and entered onto a little used detour.

Weingartner's decision did not sit well with the Sociology Department. Arnold Feldman, the department chairman, contended in a letter to Weingartner that the Promotions and

Tenure Committee - and Weingartner - had been unduly influenced by the popular, accessible style of Lever's writing and for that reason had judged it insufficiently scholarly, disregarding the judgment of the outside experts in sociology who had acknowledged her genuine contributions. Jt. Ex. 2. A delegation from the Sociology Department called on Weingartner to express their disagreement with his decision. Tr. 41. In response, Weingartner took the unusual step of undertaking to reconsider his recommendation.

Weingartner announced this step in a formal, carefully written letter dated May 14, 1980 to Feldman, with a copy to Lever. Because of its importance, it will be quoted at some length:

> You have asked me to reconsider my recommendation to the Provost not to promote Miss Janet Lever to the rank of associate professor of sociology (with indefinite tenure). Your request has led me to spend considerable additional time in reading Miss Lever's promotion dossier . . . and in reflecting on her case.
>
> These considerations have not enabled me to find sufficient ground to counter the recommendation of the CAS Promotion and Tenure Committee, so as now to recommend Miss Lever's promotion to the Provost. These same considerations have, however, led me to conclude with some clarity that the issue of Miss Lever's promotability at Northwestern . . . rests above all on the quality of her unfinished manuscript, *Soccer in Brazil* . . . .

> . . . . I should like to propose a procedure which I believe will deal equitably with the case of Miss Lever, although it should in no way be seen as a precedent for the treatment of future cases.
>
> My letter to Miss Lever of May 5 continues to constitute formal notice to the effect that the academic year 1980-81 will be her terminal year at Northwestern. If the final draft of the manuscript in question, *Soccer in Brazil*, is completed by November 1, 1980 and submitted to the Dean's Office by that date, I will undertake to have a further evaluation made of [it]. On the basis of the information I receive in this way, I will either reverse or confirm my recommendation to the Provost.

Jt. Ex. 3. Weingartner testified that such a second review is unusual, and Mack could not recall another like it. Tr. 42, 235. Weingartner testified that he had agreed to "reconsider" or "reevaluate" her candidacy if the manuscript was submitted. At his deposition he said that he agreed he would "reconsider, reopen the case." Tr. 43-44.

On June 11, 1980 Lever accepted the offer of employment for 1980-81 and told Weingartner she would deliver the completed manuscript in the fall. Def. Ex. 15. But she was concerned that the extended reconsideration might cause her to lose her right to appeal an adverse decision. According to Northwestern's Faculty Handbook, once a Dean has notified a candidate that she has not been recommended for tenure, she has six months to file an appeal with the University Faculty Reappointment, Promotion, and Tenure Appeals Panel (UFRPTAP) which considers complaints of violation of

academic freedom or inadequate consideration. Jt. Ex. 11 at 13.[2]

In June 1980 Lever approached Provost Mack, with whom she was acquainted as a fellow sociologist, to ask his advice. Mack did not want to waste the committee members' time by convening a UFRPTAP panel when it might not be necessary. Tr. 79. According to Lever, he also told her that Weingartner was "on the edge," or words to that effect, suggesting that her filing an appeal might prejudice Weingartner's decision. Tr. 108. Mack told her not to file a UFRPTAP grievance until after Dean Weingartner had completed his reconsideration, and gave his word that a subsequent appeal would not be untimely by reason of her waiting to bring it. *Id.*

Lever submitted her completed manuscript by November 1, 1980 and Weingartner sought additional opinions concerning its quality. One whom he asked to review it was Provost Mack. Mack opined that the manuscript, considered in itself, did not justify awarding tenure. Pl. Ex. 15. After considering the evaluations of these referees, Weingartner decided not to reverse his decision not to recommend Lever for tenure and so advised Lever and Feldman on January 15, 1981. Jt. Exs. 5, 6.

Lever then went to Mack and asked him to overrule Weingartner's decision. After reviewing her file, he declined to do so and so informed her in a letter dated February 12, 1981. Jt. Ex. 7. Lever then filed an appeal with UFRPTAP.

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2. Mack referred to this entity as UFRPTDAP for University Faculty Reappointment, Promotion, Tenure, Dismissal Appeals Panel. Tr. 176. The witnesses pronounced the unappealing acronym "Youfertap."

Because a panel could not be convened to hear her appeal before the end of the year, she was given a second terminal contract on July 22, 1981 which ended August 31, 1982. PTO Stip. ¶ 24. The UFRPTAP report dated February 16, 1982, Jt. Ex. 9, did not recommend overturning the decision and her employment terminated on August 31, 1982.

When Was the Decision Made?

There are three candidates for the date on which Northwestern made its decision: May 5, 1980, the date of Weingartner's first letter to Lever, January 15, 1981, when he announced the results of his reconsideration, and February 12, 1981, when Mack declined to recommend tenure. This court ruled that Lever has the burden of showing that her EEOC filing was timely, *i.e.*, that the decision was *not* made on May 5, 1980. Tr. 6.

The legal framework for our analysis is dictated by *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980). Ricks, like Lever, brought suit under Title VII after he was denied tenure. The faculty tenure committee at Delaware State College recommended in February 1983 [sic] that Ricks not receive tenure, but agreed to reconsider the following year. In February 1974 it adhered to its earlier recommendation. The following month the Faculty Senate voted to support the tenure committee's negative recommendation. On March 13, 1974 the Board of Trustees of the college voted to deny tenure to Ricks. Ricks filed a grievance with the Board's Educational Policy Committee. On June 26, 1974, while the grievance was pending, the Board told Ricks that he would be offered a one-year terminal contract, which Ricks accepted on September 4, 1974. On September 12, 1974 the Board denied his grievance. *Id.* at 252-54.

The Court of Appeals held that the period for bringing an EEOC charge commenced on June 30, 1975, Rick's last day of employment. The Supreme Court reversed. Agreeing with both lower courts that the only unlawful employment practice alleged in Rick's complaint was the denial of tenure, the Court held that the limitations period began to run at the time the tenure decision was made and communicated to Ricks. *Id.* at 258.

When was the decision made? The Court rejected Ricks' argument that it was the final date of his terminal contract because he had not alleged any facts indicating that his treatment differed discriminatorily from the treatment of other unsuccessful tenure aspirants. Although the final date of employment had the advantage of simplicity, the statute provides that limitations periods commence with the date of the alleged unlawful employment practice. The Court also rejected the suggestion offered by the EEOC as *amicus curiae* that the decision was made at the time Ricks' grievance was denied:

> [E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to influence that decision before it is made.
>
> As to the latter argument [that the grievance tolled the limitations period] we have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods. [citing *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976)]. The existence of careful procedures to assure

> fairness in the tenure decision should not obscure the principle that limitations periods normally commence when the employer's decision is made.

Id. at 261 (footnote omitted). The Court concluded that the limitations period began to run at least by June 26, 1974 when the college established its official position and made that position apparent to Ricks.

Northwestern contends that Weingartner's reconsideration is to be considered an "appeal" analogous to the grievance procedure in *Ricks* that did not delay the running of the limitations period. Lever, on the other hand, argues that the real decision was made by Mack, and that Weingartner's decision was only a recommendation. Alternatively, she argues that Weingartner promised a new decision based on new evidence, which should not be considered analogous to an appeal.

In *Ricks* the decision to deny tenure was made by the college's final decisionmaking body, the board of trustees. Ricks asked the board to reconsider, and the Court made clear that seeking reconsideration of a final decision does not make the decision less than final. Here there was no decision by the official decisionmaker, the board of trustees of Northwestern. But according to the testimony Northwestern's trustees merely rubber-stamped the Provost's recommendations for the grant of tenure and disappointed candidates never appealed to the trustees. The formal appeal was to UFRP-TAP, which could recommend to the Provost that he recommend tenure against the decision of the Dean. Faculty Handbook, Jt. Ex. 11 at 13. Mack's decision, then, qualified as a final decision for all practical purposes and Lever does not dispute this.

Who Made the Decision?

But while Mack's decision was undoubtedly a final decision, was Weingartner's? Weingartner's decision not to recommend promotion and tenure was subject to review by Mack, as Provost. Although the board of trustees in practice did not exercise its authority over tenure decisions, Mack did, and it was understood that a rejected candidate could ask him to recommend tenure even if a Dean had not recommended that tenure be granted. Although Mack never involved himself in a case of denial of tenure unless asked to do so, he had the power to act whether the candidate came to him or not. Tr. 64-67. Weingartner testified that he expected that members of the Sociology Department would have appealed his decision regarding Lever to Mack, just as they had unsuccessfully appealed to him. Tr. 53. There is thus a question whether Weingartner's decision was sufficiently final to start the limitations clock.

In resolving this issue it is necessary to look both at Weingartner's actual authority and the authority Lever reasonably believed he had, since under *Ricks* the limitations period commences only when the decision is made and *communicated* to the employee. If one in Lever's position would not have reasonably believed that Weingartner had the authority to deny her tenure, the limitations period would not begin to run until she discovered, or reasonably should have discovered, that he did. *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990).

Northwestern distinguishes between a decision in favor of tenure, which is a recommendation to the Provost, and a decision against tenure, which never reaches the Provost unless

the candidate "appeals" the Dean's failure to recommend.[3] It is undisputed that Weingartner did not have the authority to *grant* tenure. According to Mack, approval by the Provost was not necessary when tenure was denied; authority to deny tenure is delegated to the Dean of the college. Tr. 162. Weingartner testified that Mack was often unaware that someone was denied tenure. Tr. 24.

Mack and Weingartner met and discussed Weingartner's recommendations for promotion and tenure in May of each year before Weingartner made his recommendations and set out letters to the candidates. Tr. 162-66. Normally Mack signed off on Weingartner's positive recommendations at that meeting, so that the Provost's approval had already been secured before a successful candidate was notified of the Dean's recommendation that he or she be promoted. Tr. 217-18. Sometimes if Mack disagreed with him Weingartner would change his mind. Mack Dep. Pl. Br. App. A at 99. Although Mack was not always supplied with a list of those whom Weingartner was not recommending for promotion, he often was. In Lever's case he was aware of it before Weingartner announced that he would not recommend her for tenure. Tr. 192. According to Weingartner, it was unusual for them to discuss the cases of those Weingartner was not

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3. At the hearing Mack and Weingartner studiously avoided referring to the Dean's decision against tenure as a "recommendation." However Weingartner referred to his negative decision with respect to Lever as a "recommendation to the Provost" in his May 14, 1980 letters to Feldman and Lever, Jt. Exs. 3, 4, and his letters to Feldman and Lever dated January 15, 1981, Jt. Exs. 5, 6. On the other hand, he called it a "decision not to recommend" and a "failure to recommend" in his letter to Lever of June 2, 1980, Def. Ex. 14.

recommending for tenure. Tr. 269. Mack stated that Weingartner would have told him about reopening his consideration of Lever's candidacy because it was unusual. Tr. 74.

Lever argues that the tenure process described by Weingartner and Mack at the trial is inconsistent with the process described in University publications, specifically the CAS Faculty Handbook and the University Faculty Handbook. Jt. Exs. 10, 11. She emphasizes statements in both publications that a Dean's recommendations on tenure are subject to review by the Provost without distinguishing between positive and negative recommendations, the fact that appeals are to UFRPTAP and the absence of any reference to appeals to the Provost. She also points to what she contends is inconsistent deposition testimony on this issue.

The court finds Weingartner's and Mack's testimony at the trial persuasive and the claimed inconsistencies unconvincing. The sketchy description of the tenure process in the University publications also provides substantial support for the University's position. The CAS Faculty Handbook states, "A decision by the Dean to recommend against the granting of tenure leads to an offer of a terminal year beginning on the same date", Jt. Ex. 10 at 10, indicating that the Dean's decision was effective without any action by the Provost. Similarly, both publications state that appeals to UFRPTAP are from the recommendations of the Dean not the Provost. Read in context, Weingartner's deposition testimony is not inconsistent with his testimony at trial. See Tr. 37-28 and 57-58. Mack's deposition testimony is somewhat cryptic while his trial testimony is fully developed and convincing.

What we find decisive is the essentially undisputed testimony, supported by documents, about how the process actually worked. It is undisputed that Weingartner had and

consistently exercised the authority to offer a terminal year contract specifying an employment termination date at the time he notified an unsuccessful candidate of his negative recommendation. As Judge Williams observed, "The person who has the authority to offer an 1-year terminal contract must have the authority to make a final tenure decision." Feb. 5, 1990 Mem. Opinion and Order at 6. Given the AAUP policy followed by Northwestern under which employment for seven years automatically results in tenure, the decision to offer a terminal year of employment communicated before the seventh year is the corollary of a decision to deny tenure to someone in Lever's position.

Mack could think of only two cases in 12 years where he had reversed a negative decision of the Dean. Tr. 66.[4] Authority does not mean unreviewable authority; the fact that a supervisor's decision to discharge an employee could be reversed by someone higher up will not prevent the limitations period from running. If the superior does not ordinarily involve himself in the decision that is persuasive evidence that he has delegated the power to make it. Mack became involved in a denial of tenure only if the candidate requested it, and only in a few instances did he substitute his judgement for Weingartner's. We conclude that Weingartner did have authority to deny tenure and his decision to do so in Lever's case was final for *Ricks* purposes.

Our conclusion is also supported by Lever's testimony. She had read the CAS and Northwestern Faculty Handbooks,

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4. It is not clear whether he meant any dean's decision or only decisions of the Dean of the College of Arts and Sciences.

Jt. Exs. 10, 11. Tr. 91. She testified that when she received the May 5, 1980 letter she did not have a sense that the process was over; on the contrary, "[t]hat's when things started getting interesting." Tr. 96. She believed the decisionmaking process was over only after Mack upheld Weingartner's recommendation. Tr. 112.

On the other hand, she had been on campus six years and had observed the system in practice. "[W]e followed other peoples' review process, those that came before me, with great interest and learning along the way." Tr. 91. Other faculty members denied tenure and asking Mack to review their cases referred to the process as an "appeal." Def. Ex. 31 B, C (other letters included in the exhibit refer to appeals to UFRPTAP). See also the reference to "Dean Weingartner's decision to deny tenure on May 5, 1980" in the UFRPTAP report. Jt. Ex. 9 at 2.

Lever admitted having testified in deposition that she was turned down for tenure in May of 1980, Tr. 133, and wrote a letter to Weingartner on May 20, 1988 [sic] referring to the "six months it took to reach a tenure decision that is so fateful both for Northwestern and me." Def. Ex. 12 at 3. And on May 22 she again wrote Weingartner, requesting a summary of the reasons "Northwestern finds me unworthy of tenure at this time." Def. Ex. 13.

Most telling is her statement in her EEOC charge that she was denied tenure on January 15, 1981 when Weingartner wrote Feldman confirming his earlier recommendation. Def. Ex. 28. She did not mention Mack's affirmance of February 12 as constituting the discriminatory decision. Although she testified that the charge was prepared by an EEOC officer who did not let her put everything into it that she would have liked, Tr. 147-48, it is reasonable to suppose she gave what

she believed was the significant decision and its date. We conclude that although she knew that Mack could reverse it, Lever also knew that the Dean had the authority to deny promotion to tenured status, and that the decision had been made by Weingartner.

The Significance of Weingartner's Reconsideration.

The second problem is how to treat Weingartner's May 14, 1980 letter to Feldman offering to reconsider if Lever submitted a completed manuscript by November 1, 1980. If Weingartner rescinded his decision pending reconsideration, there was nothing of which Lever could have complained, and no final decision until Weingartner announced the result of his reconsideration.

Under *Ricks* the limitation period starts to run not when the decision is made but when the employee knows or reasonably should have known it was made. Compare *Clark* v. *Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir. 1988) (''Determination of when notice has been communicated to an employee is based upon an objective standard, focusing on when the employee knew, or reasonably should have known, that the adverse employment decision had been made.'') with *Cada*, 920 F.2d at 453 (plaintiff in fact knew he had been fired, arguably a subjective standard.) Lever concedes that the *Ricks* standard ''is probably an objective one'' but argues that her state of mind is relevant to determine reasonableness. Pl. Br. at 28. In any case the employer's decision must be clearly communicated to the employee, see *Cada*, 920 F.2d at 450, and the notice must be unequivocal. *English* v. *Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

We agree with Northwestern that Weingartner's May 5, 1980 letter is not in any way tentative. But was it withdrawn

in response to Feldman's criticism, with the understanding that Weingartner would make a new decision based on the opinions of the referees? Lever points to Weingartner's trial testimony, "I agreed to think again . . . I could change my mind," Tr. 301, 302, and his deposition testimony, "in respect to the scholars who urged me to change my mind, I would reconsider, reopen the case, if the entire manuscript were completed." Tr. 43. But the focus should be on what Weingartner *actually said* in his May 14 letter. That was the communication and the basis for what Lever knew or reasonably should have known.

We find that the May 14 letter was clear notice to Lever that Weingartner's May 5, 1980 decision denying tenure was not rescinded and remained in effect unless it was changed. *First*, Weingartner said he had reviewed the evidence but had not been persuaded to change his original recommendation. He did not say that his original recommendation was unsound. He did not say it was rescinded.

Second, he said that his letter of May 5 continued to constitute formal notice that her employment would terminate at the end of the academic year 1980-81. This was by any standard unequivocal notice that his May 5 decision stood unless it was changed. Lever argues that this statement was not a final end to the process but was included because under the guidelines of the American Association of University Professors (AAUP), adhered to by Northwestern, a professor becomes tenured automatically unless she receives such notice before the beginning of the seventh year. Tr. 159-60. While this may well have been a reason for its inclusion, the fact remains that she was given unequivocal notice of an adverse employment action, that her employment at Northwestern would terminate on August 31, 1981.

Third, if Lever's completed manuscript was submitted by November 1, Weingartner would have a further evaluation made and on the basis of the information received he would "either reverse or confirm my recommendation to the Provost." "Reverse or confirm" indicates that the original decision was to stand unless overturned; he was not conceding that the earlier decision was flawed, only that it might be altered.

The question is not whether new evidence would be considered. Academic processes are not required to follow the rules used by courts in such matters. There is no suggestion in the May 14 letter that the May 5 decision was in any respect tentative. See *Ricks*, 449 U.S. at 261. Weingartner's stated willingness to change his prior decision *if* a completed manuscript was submitted by November 1 was a possible remedy for the earlier decision, "not an opportunity to influence that decision before it [was] made." *Id.*

And Lever herself did not believe Weingartner had rescinded his earlier decision. In her letter to Weingartner of May 22, 1980, she stated that "I am extremely unhappy with your decision. . . . My unhappiness is in no way diminished by your letter to Professor Feldman of May 14." Def. Ex. 13. She also testified at her deposition that she was concerned about the timeliness of a UFRPTAP appeal because she understood that Weingartner's letter of May 14 "reopened the decision without rescinding the first decision." Tr. 136. Since the first decision was not rescinded, there was pending no more than a request for reconsideration which, under *Ricks*, did not prevent the limitations period from running.

Further Discriminatory Acts

Lever argues that her claim was timely in any case because she has alleged discriminatory acts by Weingartner and Mack subsequent to Weingartner's decision and even after Mack's denial of her appeal. She refers generally, without specifying, to (a) discriminatory acts alleged in her complaint, (b) discriminatory acts mentioned in the UFRPTAP Report, Jt. Ex. 9, (c) Weingartner's April 6, 1981 letter to the chairman of the UFRPTAP committee, Pl. Ex. 29, and (d) acts reviewed at pages 13-15 of Judge Williams Memorandum Opinion dated Feb. 5, 1990. She also emphasizes ways in which her denial of tenure differed from the manner in which Northwestern treated other terminated candidates who also had been denied tenure. Pl. Br. at 17 n. 5 and 18.

The only acts by Weingartner or Mack subsequent to May 5, 1980 alleged in the complaint or mentioned in the UFRP-TAP report are Weingartner's May 14, 1980 letter denying the request of the Sociology Department to reverse his decision, Mack's refusal in early 1981 to overturn the denial of tenure and Weingartner's letter to Lever dated March 18, 1981 [should be 1982] confirming that her appointment would terminate on August 31, 1982. Complaint Section IV, ¶¶ 11-13. The allegations in paragraphs 11 and 12 that Weingartner's and Mack's stated reasons for their actions were pretextual do not describe independent acts of discrimination apart from Lever's underlying claim that the denial of tenure itself was discriminatory. Weingartner's March 18, 1982 letter merely confirmed the delayed consequence of that denial, the termination date of her final contract of employment.

The alleged acts of discrimination discussed at pages 13-15 of Judge William's opinion and in the UFRPTAP report, with

one exception, were all prior to May 5, 1980. The exception is Weingartner's solicitation of additional letters regarding Lever's manuscript during his reconsideration. Having reviewed the evidence, we find nothing to indicate that any thing during the reconsideration process reflected discrimination against Lever because of her sex. Nor are we able to discern anything discriminatory in Weingartner's April 6, 1981 letter to the UFRPTAP committee chairman, Pl. Ex. 29, suggesting that Lever's appeal to that committee was untimely. Weingartner was apparently unaware of Mack's commitment to waive the normal six month limitations rule for such appeals. In any event his suggestion was rejected, the committee proceeded to give full consideration to Lever's appeal and she was not harmed.

Finally, Lever is correct in saying that the tenure denial process in her case differed in several ways from the manner in which Northwestern terminated others who were denied tenure. But differences alone are not enough. *Ricks* says that the differences must themselves be discriminatory. 449 U.S. at 258, and she has not shown any such discrimination.

Equitable Tolling and Equitable Estoppel

Lever contends that even if she was informed of a final decision for *Ricks* purposes on May 5, 1980, equity should excuse the late filing of her EEOC charge. The limitations period is not jurisdictional and is subject to equitable exceptions. *Zipes* v. *Trans World Airlines*, 455 U.S. 385, 393 (1982).

Both equitable estoppel and equitable tolling were recently discussed in *Cada*. Equitable estoppel applies when the defendant has taken active steps to prevent the plaintiff from suing in time, such as by promising not to assert a limitations

defense or by forging documents to convince the plaintiff that she does not have a case. Equitable tolling, on the other hand, does not require deliberate action by the defendant. It applies when the plaintiff knows she is injured but cannot obtain information necessary to decide whether the injury is possibly due to wrongdoing. *Cada*, 920 F.2d at 450-51.

Equitable estoppel does not apply because Northwestern did nothing to prevent Lever from filing a charge. While Mack did give his word that an appeal to UFRPTAP would not be dismissed as untimely, Lever never asked about a possible gender discrimination complaint. There is no evidence that the reconsideration process was a sham intended to prevent her from filing an EEOC complaint within the limitations period. And Lever concedes that Mack did not mislead her as to the necessary filing dates with the EEOC. Pl. Reply at 8.

Lever contends however that Mack did mislead her as to whether a final decision on her case had been made. That argument must be rejected in view of our findings that a) the decision to deny tenure was made by Weingartner on May 5, 1980, b) Lever knew that Weingartner had the authority to make that decision, c) Lever received clear notice of that decision and d) her conversations with Mack related to her appeals to him and to UFRPTAP.

Lever cites *Cocke* v. *Merrill Lynch & Co. Inc.*, 817 F.2d 1559, 1561 (11th Cir. 1987), for the proposition that "it is simply unreasonable for the law to expect an employee to sue his employer for discrimination at the same time that the employee is led to believe that the employer is considering whether to rescind a prior employment recommendation or decision." Pl. Br. at 32.

We agree that a person in Lever's position faces a difficult dilemma. But the problem is that her argument was squarely rejected in *Ricks*. The Third Circuit in that case believed that an aggrieved employee should not be expected to resort to litigation until termination had actually occurred, among other reasons because resort to such remedies would injure working relationships. 449 U.S. at 256. The Court also acknowledged that the filing of a lawsuit might deter efforts at conciliation. *Id.* at 259 n. 11. And Justice Stevens' dissent observed that filing a charge while the teacher is still employed could prejudice any pending reconsideration of the tenure decision. *Id.* at 266 n. 2. The Court rejected these arguments, and therefore so must we, because of Congress' determination that the limitation periods commence with the date of the alleged unlawful employment practice. *Id.* at 259.

Cocke was a suit under the ADEA and dealt with a different situation. The plaintiff had been told that his employment with the defendant would terminate in seven months, but was also told that the defendant would attempt to find him another position in the company before then. The Eleventh Circuit held that the limitations period began to run from the time a reasonable person would have known that the defendant was no longer seeking another position for him, not from the date of the notice. Although the court stated it was applying equitable tolling, under the Seventh Circuit's exposition in *Cada* the question in *Cocke* was one of equitable estoppel since it was based on the employer's affirmative conduct. The plaintiff in *Cocke* did not lack information to establish the wrongfulness of his discharge, but was dissuaded from filing a charge by his perception that the employer would try to find another position for him.

With due respect to the Eleventh Circuit, we also believe that *Cocke* is inconsistent with *Ricks* and with the Seventh

Circuit's approach in *Cada*. The plaintiff in *Cocke* had been told unambiguously that he would lose his job. The possibility that his employer might find another one for him did not detract from that finality. It could be argued that if the employer *had* found him another position it would negate the possibility that the employer was trying to get rid of him because of his age; until the employer's efforts proved to be a sham, he was unsure that he had a cause of action. But the same argument could have been made in *Ricks*. If the board of trustees after reconsideration had granted Ricks tenure, he could not have claimed that he was discriminated against. The Supreme Court rejected this approach, and so must we.

Lever asserts that the tenure and promotion process was "hopelessly equivocal." Judge Williams ruled that Northwestern could be estopped if its procedures "were so hopelessly equivocal that it would be manifestly unfair to hold Ms. Lever to ascertaining a date certain where none existed." Feb. 5, 1990 Mem. Opinion and Order at 12. While Lever has pointed to ambiguities in the University publications, we have found that the tenure process as it actually works at Northwestern and as it worked in Lever's case provided her with clear notice that the decision to deny her tenure was made by Weingartner on May 5, that decision was not rescinded on May 14 and she was not misled.

Turning to equitable tolling, Lever has not alleged any particular information she needed to have that she could not discover in time to bring suit within 300 days after May 5, 1980. As *Cada* pointed out, there is no requirement that a complainant conduct a pre-filing inquiry before filing an EEOC complaint. *Cada*, 920 F.2d at 452; an employee may bring a charge based on suspicion.

Lever has not pointed to any facts that she was unable to obtain within the 300 day period and that she needed in order to decide whether the denial of tenure was possibly discriminatory. Nor could she in view of her testimony that when she learned of Weingartner's May 5 decision she became aware that people in her department felt it was "an unfair and a biased decision" and that her letter to Weingartner dated May 22, 1980 was "a statement that I think the decision was a discriminatory and biased decision." Lever Dep. Def. Ex. 36 at 183, 188-89.

Continuing Violation

Lever finally contends that Weingartner's reconsideration and Mack's refusal to overturn it constitute separate violations of Title VII occurring within the limitations period. This is untenable. There was *one* decision — denial of promotion and tenure — that had a single, albeit severe, impact upon Lever when her employment was terminated. The evidence does not support the suggestion that Weingartner's reconsideration and Mack's refusal to overturn it established a visible pattern of discriminatory treatment which for the first time gave Lever reason to believe that she was a victim of discrimination. Lever argues that under *Malhotra* v. *Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), she can claim a continuing violation because it would be unreasonable to require her to bring suit upon each violation separately. But there was only one violation, and, under *Ricks*, it was incumbent upon her to file a complaint within 300 days after Weingartner initially announced his decision rather than await his reconsideration. If Lever's contention were accepted, it would negate the holding of *Ricks* that a pending request for reconsideration does not extend the limitations period.

CONCLUSION

We conclude that Lever's EEOC filing was untimely and her suit should therefore be dismissed. The above is submitted as this court's findings of fact and conclusions of law and as the Report of the undersigned as Special Master under Fed. R. Civ. Proc. 53. In accordance with that rule, this Report, the trial transcript, the briefs submitted by the parties and the original exhibits have been filed this day with the clerk of the court.

Under Fed. R. Civ. Proc. 53(e)(2) the parties have 10 days from the date of service hereof to file written objections to this Report with Judge Williams. Failure to file such objections will waive the right to appeal the rulings set forth in this Report. *Provident Bank* v. *Manor Steel Corp.*, 882 F.2d 258, 261 (7th Cir. 1989).

Respectfully submitted,

/s/ BERNARD WEISBERG

Bernard Weisberg
United States Magistrate Judge

Date: June 11, 1991

cc: All Attorneys of Record
(See Attached Service List)

EXHIBIT D

D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 84 C 11025

JANET LEVER,

Plaintiff,

v.

NORTHWESTERN UNIVERSITY; RAYMOND MACK, Provost; RUDOLPH WEINGARTNER, Dean, College of Arts and Sciences,

Defendants.

MEMORANDUM OPINION AND ORDER

Janet Lever is suing Northwestern University, claiming that she was discriminated against on the basis of sex in violation of Title VII when she was denied tenure. She also alleges breach of contract in a pendent state claim. Northwestern moves for summary judgment on both counts. The court denies this motion as to the Title VII claim and grants it as to the contract claim.

Facts

Ms. Lever began working as a full-time Assistant Professor in Northwestern's Sociology Department in 1974 and became eligible for tenure in the fall of 1979. In October 1979, the

tenured faculty members of the Sociology Department met and unanimously recommended to Dean Weingartner that Ms. Lever be granted tenure. A confidential *ad hoc* committee comprised of three tenured faculty members and three external referees was then selected in November 1979. On March 4, 1980, this *ad hoc* committee submitted its report to the Dean. Although the *ad hoc* committee had some serious reservations, it nonetheless unanimously recommended that Ms. Lever be granted tenure. The next step in the tenure process involved several meetings of the Committee on Promotion and Tenure (the P&T Committee) in April 1980 to discuss candidates for tenure in the College of Arts and Sciences. On April 28, 1980, the P&T Committee voted 11 for and 6 against recommending that Ms. Lever be granted tenure. Since a two-thirds majority is necessary for a favorable recommendation to the Dean, Ms. Lever was not recommended for tenure by the P&T Committee.

On May 5, 1980, Dean Weingartner notified Ms. Lever that he had accepted the P&T Committee's negative recommendation and would recommend to the Provost that she not be granted tenure. At the same time, the Dean offered Ms. Lever a terminal one-year employment contract ending August 31, 1981. Four days later, Professor Feldman, on behalf of the Sociology Department, requested that Dean Weingartner reconsider his recommendation. On May 14, 1980, Dean Weingartner notified Professor Feldman and Ms. Lever that his negative recommendation stood. However, he agreed to reconsider if Ms. Lever submitted a final draft of her manuscript, *Soccer Madness*, by November 1, 1980, which she did. In a letter dated June 2, 1980, Dean Weingartner stated that "the reasons for this failure to recommend pertain to your writing and publications." Defendants' Exhibit 11. On January 15, 1981, Dean Weingartner confirmed that he

would submit a negative recommendation to Provost Mack. By letter dated February 12, 1981, Provost Mack informed Ms. Lever that he accepted the Dean's recommendation not to grant her tenure.

Ms. Lever challenged the tenure denial by filing a grievance with the University Faculty Reappointment, Promotion and Tenure Appeals Panel (''Appeals Panel'') on April 1, 1981. She also filed a charge with the EEOC on June 15, 1981 alleging sex discrimination. Due to her pending appeal, on July 22, 1981, Dean Weingartner offered Mr. [sic] Lever a reappointment for the 1981-82 academic year, which Ms. Lever accepted. On February 16, 1982, the Appeals Panel denied Ms. Lever's appeal and her last day of employment at Northwestern was August 31, 1982.

Timeliness

Northwestern argues that Ms. Lever's Title VII claim is time-barred because she did not file her EEOC charge within 300 days of Dean Weingartner's May 5, 1980 letter. Although it is a close question, the court disagrees.

In *Delaware* v. *Ricks*, 449 U.S. 250 (1980), the Supreme Court held that the statute of limitations in a Title VII tenure denial case begins to run when a final tenure decision is made and the plaintiff is notified. *Id.* at 258. The plaintiff in *Ricks* received a letter on June 26, 1974, written by the President of the Board of Trustees of Delaware State College. The letter informed Mr. Ricks that he had been denied tenure, but that this decision could change depending on the outcome of a grievance that Mr. Ricks had filed after the Board had voted on March 13, 1974. The Board also offered Mr. Ricks a ''terminal'' contract to teach for one more year. *Id.* at 253. The Board denied Mr. Rick's grievance on September 12, 1974.

The Court in *Ricks* rejected the argument that the "unlawful employment practice" of which the plaintiff complained was his termination from employment. Instead, the Court found that any Title VII violation that may have occurred related to the decision to deny tenure: Mr. Rick's termination was the inevitable, though delayed, consequence of that denial. The Court therefore held that "the limitations period commenced to run when the tenure decision was made and Ricks was notified." *Id.* at 259. In addition to rejecting the last day of employment as triggering the limitations period, the Court also rejected the date on which Mr. Rick's grievance was denied. Mr. Ricks had argued that, until his grievance was resolved, the Trustees had only expressed their intent to deny him tenure, not their actual decision to do so. The Court, however, looked to the June 26 letter, which characterized the denial as the Board's "official position." That the Board was willing to change its mind if the grievance was found to have merit did not make the decision tentative: "The grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Id.* at 261. The Court also rejected the argument that a pending grievance, or some other collateral review of the denial, tolls the limitations period. The existence of procedures to assure fairness should not detract from the fact that the limitations period is triggered when the employer makes its decision. *Id.* The Court then added: "We do not suggest that aspirants for academic tenure should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws." *Id.* at 261, n.15.

The Court in *Ricks* cautioned that applying the general principles set out there must be done on a case-by- case basis.

How to apply those principles to this case is by no means clear. As in *Ricks*, the general issue here is when the tenure decision became final. Unlike *Ricks*, this issue turns on the more particular question of the chain of authority at Northwestern for tenure decisions: that is, whether it was Dean Weingartner or Provost Mack who made the final decision.

Northwestern contends that Dean Weingartner's May 5, 1980 letter, stating that he would give the Provost a negative tenure recommendation, constituted notice of a final decision and that subsequent events were "mere requests to reconsider." See Appendix 1. There is much to support this position. Probably the strongest argument is the fact that in that letter, the Dean offered Ms. Lever a 1-year terminal appointment: "I therefore offer you a final year at Northwestern as assistant professor of sociology, terminating August 31, 1981. . . . please send me a note informing me whether you accept appointment for the terminal year mentioned above." There is no dispute that Northwestern follows the common practice of most universities of accompanying a tenure denial with an offer of a one-year terminal appointment. This fact, together with Dean Weingartner's May 5, 1980 letter and its reference to a "final" and "terminal" year, should have alerted Ms. Lever to the fact that she had been denied tenure and that Dean Weingartner had the authority to make that decision. The person who has the authority to offer a 1-year terminal contract must have the authority to make a final tenure decision. *Ricks* itself focused on the offer of a terminal contract as a key fact in assessing the finality of a tenure denial. *Ricks*, 449 U.S. at 253, 254, 258, 261.

Northwestern's position is also supported by Dean Weingartner's two May 14, 1980 letters, one to the Chairman of Sociology, Arnold Feldman, and the other to Ms. Lever.

See Appendices 2 and 3. (As is clear from the letter to her, Ms. Lever received a copy of the letter to the Chairman). In the letter to Mr. Feldman, the Dean states: "My letter to Miss Lever of May 5 continues to constitute formal notice to the effect that the academic year 1980-81 will be her terminal year at Northwestern." That letter also begins by noting that the Dean is *reconsidering* his prior recommendation, a term that is echoed in the letter to Ms. Lever, "the Department of Sociology has appealed to me to reconsider my recommendation to the Provost concerning your promotion." As Northwestern points out, "[m]ere requests to reconsider . . . cannot extend the limitations period applicable to the civil rights laws." *Ricks*, 449 U.S. at 261 n.15.

Northwestern points to two other facts in support of its position that Dean Weingartner's May 5 letter triggered the statute of limitations. First, it was apparently Ms. Lever's own perception that May 5, 1980 was the critical date for her tenure denial. In her Complaint, she alleges that "Defendant Weingartner, on May 5, 1980, accepted the recommendation of the Promotion and Tenure Committee, despite his discretion to do otherwise, and denied Promotion and Tenure to the Plaintiff . . . ." Complaint, IV, ¶ 10. And at one point in her deposition, Ms. Lever said "After I was turned down for tenure on May 5 . . . ." While certainly not dispositive, Ms. Lever's own perception of "when the tenure decision was made and [she] was notified" (*Ricks*, 449 U.S. at 259) might be relevant to ascertaining Northwestern's procedures. The second fact that Northwestern points to is Provost Mack's affidavit, in which he lays out Northwestern's tenure procedures. See Appendix 4. Northwestern focuses on ¶ 6(d)(ii) in the affidavit, where, according to Provost Mack, it is made clear that while the Dean's recommendation *for* tenure is not final, his recommendation *against* tenure is.

Ms. Lever contends that her tenure denial was not final until Provost Mack's February 12, 1981 letter, all prior letters and communications being merely "recommendations," not final decisions. As with Northwestern's arguments, there is much to support Ms. Lever's position.

Perhaps most importantly, Ms. Lever points to Dean Weingartner's deposition testimony where he outlines his role, and the Provost's, on tenure decisions:

> Q. . . . Has there ever been an occasion when the provost has taken your recommendation, reviewed it, sent it back to you, and said I have no decision here, you make the decision?
>
> A. I really can't understand the language. The provost might say I have no opinion on this case beyond the opinion that you have, and this dossier which is about this fat, which is available to the provost. But I cannot literally, cannot make a decision to promote because a person is not promoted until the board of trustees has voted on the promotion, and I cannot write a letter to the board of trustees saying the provost told me to write to you and have you vote in support.

Weingartner Dep., p. 24-25. Elsewhere in his deposition, Dean Weingartner is careful to describe his role as subordinate to the Provost: "It's presumably before I rendered my decision or, I should say, recommendation to the provost to be legal." Weingartner Dep., p. 208.

Other testimony by the Dean further supports Ms. Lever's contention. In his discussion of the appeals process, Dean Weingartner responded to a question asking if he discussed his appearance before the appeals panel with the Provost: "Well, we sure had a conversation on this deadline business

that we talked about earlier, but I don't recall anything else. Both of us feel strongly that it's important for the appeals process to work in independence of the rest of us." Weingartner Dep., p. 266. And earlier, he had said, "We have what I believe to be a very good appeals system, and it's very independent, and the administration cooperates very much." *Id.*, p. 217. The implication here is that the Dean considers that part of the tenure process that follows the decision in the administration (i.e., the Dean and the Provost) to be merely appeals of a decision already made. So if the appeal starts after the administration has had its say, it is possible to infer that the decision is not final until the highest administrator has spoken. In this case, that would be the Provost, not the Dean.

Provost Mack's deposition testimony further supports Ms. Lever's argument that he was the final decision-maker in her tenure denial. It is significant that, as is evident in the following passage, the Provost begins by correcting the questioner, who had referred to the Dean's *decision* not to promote:

> Q. Just for clarity sake, let me ask you now when you say there is a decision not to promote, do you mean if two candidates have failed to reach the two-thirds majority of the tenure and promotion committee?
>
> A. Failed to be recommended by the dean. Each of the steps is recommendatory and each of the parties is without organizational authority in the industrial sense because it is a collegial environment; therefore, the department reviews and recommends, an ad hoc committee reviews and recommends, the promotion and tenure committee reviews and recommends, the dean reviews and recommends to me.

Q. Have you completed your answer?

A. Yes.

Q. So is it fair to say then that normally the dean would give you his opinion first before you would give him your opinion?

A. The dean would give me a recommendation to promote or the statement that he was not recommending promotion, right.

Q. And you would not — And then you would be in the role of either affirming or reversing his recommendation?

A. That's correct. That's right.

Q. Accepting or not accepting his recommendation?

A. That's correct.

Mack Dep., pp. 97-98. Later in the deposition, when he is describing the chain of authority on tenure decisions, Provost Mack states: "So for practical purposes, I was the end of the line on an ordinary case . . . ." Mack Dep., p. 102.

Ms. Lever draws further support for her position from the Northwestern University Faculty Handbook ("University Handbook") and the Northwestern University College of Arts and Sciences Faculty Handbook ("College Handbook"). Both handbooks consistently refer to the Dean's role as "recommending" for or against promotion, and the word "recommend" in ordinary usage does not connote finality. The Dean's letters to Ms. Lever pick up on this usage, as he consistently refers to his "recommendation" to the Provost. According to Ms. Lever, this further supports her claim that her tenure denial was not final within the meaning of *Ricks* until the Provost's letter of February 12, 1981.

The upshot of all of this is that the court cannot say with any certainty that either the May 5, 1980 letter from Dean Weingartner or the February 12, 1981 letter from Provost Mack constituted final notice to Ms. Lever so as to trigger the statute of limitations. As in *Ricks*, Ms. Lever was given a terminal contract with the May 5 letter. However, in *Ricks*, the denial came from the President of the Board of Trustees, not a dean. See also *Rodriguez* v. *Chandler*, 641 F. Supp. 1292, 1295 (S.D.N.Y. 1986). Moreover, while isolated portions of the various correspondence and deposition testimony use phrases such as "final notice," "terminal," "official position," (for May 5 and pre-May 5 events) and "appeal" (for post-May 5 events), all of which support Northwestern's position, other portions of those same documents are more equivocal with the use of terms such as "reconsider" and "recommend" supporting Ms. Lever. The date on which Ms. Lever's tenure denial became final so as to trigger the statute of limitations is a disputed issue of material fact. Summary judgment must be denied on this issue. *Stewart* v. *RCA Corp.*, 790 F.2d 624, 627-28 (7th Cir. 1988). Additionally, the court finds this issue to be appropriate for resolution under Fed. R. Civ. P. 42(b), see *Stewart*, 790 F.2d at 679, and accordingly will hold a hearing limited to the timeliness issue.

It is worth noting that while there are only two potential dispositions of this issue (i.e., favoring either Ms. Lever or Northwestern), there are three possible factual resolutions. If the court finds May 5, 1980 to be the date tenure was denied, Northwestern wins. If the court finds February 12, 1981 to be that date, Ms. Lever wins. A third possibility is that the court could find that Northwestern's procedures (or at least those procedures as they were implemented in Ms. Lever's case) were so hopelessly equivocal that it would be manifestly

unfair to hold Ms. Lever to ascertaining a date certain where none existed. See *Ricks*, 449 U.S. at 262 n.16. See also *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982). In such a case, the court would find Ms. Lever's Complaint to be timely.

Title VII

Northwestern argues that it is entitled to summary judgment on Ms. Lever's Title VII claim because there is no genuine issue of material fact that sex was a factor in Ms. Lever's tenure denial. Northwestern does not contest that Ms. Lever has established a *prima facie* case under Title VII. The issue is whether the University's articulated, non-discriminatory reason for the tenure denial — the quantity and quality of Ms. Lever's scholarship — is pretextual. Ms. Lever has the burden of showing pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). Ms. Lever has presented evidence sufficient to raise a genuine issue of fact regarding pretext, thereby precluding summary judgment.

Contrary to Northwestern's assertions, Ms. Lever's use of "comparative evidence" to show pretext is appropriate: "if others were hired or promoted though by the same reasoning they ought to have been excluded, then the motive is a "'pretext'." *Namenwirth* v. *Bd. of Regents*, 769 F.2d 1235, 1240 (7th Cir. 1985) citing *Mozee* v. *Jeffboat*, 746 F.2d 365, 369 (7th Cir. 1984). This evidence compares the treatment of six male tenure candidates with the treatment of Ms. Lever in an effort to establish that she was held to a stricter standard than similarly situated men. As stated by the Seventh Circuit,

"It is not determinative that the motive as applied to the plaintiff is 'genuine' or 'reasonable;' if it does not apply to all equally, it does not rebut a charge of discrimination." *Namenwirth*, 769 F.2d at 1240. A genuine issue of fact exists regarding whether this comparative evidence shows pretext.

Ms. Lever contends that there are four alleged procedural irregularities which also are material issues of fact. See Plaintiff's Brief, pp. 33-34. "Departures from procedural regularity . . . can raise a question as to the good faith of the process where the departure may reasonably affect the decision." *Zahorik* v. *Cornell University*, 729 F.2d 85, 93 (2nd Cir. 1984). The alleged irregularities are as follows: 1) the second round of outside referee letters for the *ad hoc* committee, 2) Dean Weingartner's negative characterization of the outside letters to the P&T Committee before discussion of Ms. Lever's candidacy, see Plaintiff's Exhibit A-21, p.3, Becker Aff. ¶ 4, p. 3) the negative straw vote taken by the P&T Committee before, rather than after, the testimony of the sociology department delegation, see Plaintiff's Exhibit A-17, Appeals Panel Report, p. 12, and 4) Dean Weingartner's solicitation of additional letters regarding Ms. Lever's *Soccer Madness* manuscript during his reconsideration. These alleged irregularities appear slight; if indeed they are material, they are barely so. Furthermore, Dean Weingartner has offered explanations for these occurrences, which, if believed, suggests that not only were they not irregularities, but that they were done to help Ms. Lever's case. However, on a motion for summary judgment, all reasonable inferences must be taken in favor of the party opposing the motion. *Valentine* v. *Joliet Township High School District*, 802 F.2d 981, 986 (7th Cir. 1986). The irregularities that Ms. Lever identifies, if established, could give rise to an inference of discrimination. If Ms. Lever was subjected to particularly

rigorous scrutiny, this could have magnified her faults. Furthermore, the alleged negative remarks and straw vote may have affected the P&T Committee's decision by establishing an unfavorable first impression that was difficult to overcome.

Viewing the evidence in the light most favorable to Ms. Lever, a reasonable jury could infer that Northwestern's proffered reason for denying tenure was pretextual. Summary judgment on the Title VII claim is therefore denied.

Contract Claim

Northwestern argues that Ms. Lever's pendent contract claims fail to establish the existence of a contract under Illinois law and, thus, summary judgment should be entered in its favor. The court agrees.

Oral Contract Claim

Ms. Lever alleges that when she was hired, various faculty members advised her that "Northwestern was . . . loyal to its people and awards them with tenure for good service." Plaintiff's Exhibit E-51, Lever Dep., p. 74. She further alleges that based on those representations about tenure, she refused an offer from another institution. Such allegations do not make out an enforceable contract.

First, the alleged promise of "tenure for good service" does not meet the requirement of a definite and certain promise. See *Ladesic* v. *Servomation Corp.*, 140 Ill. App. 3d 489, 488 N.E.2d 1355, 1357 (1st Dist. 1986). Second, the individual faculty members lacked authority to grant tenure, making it unreasonable to consider their representations to be an offer. See *Smith* v. *Board of Education*, 708 F.2d 258, 264 n.4 (7th Cir. 1983). Third, Illinois has held that foregoing other employment opportunities is not sufficient consideration

for an oral promise. *Id.*; *Ladesic*, 488 N.E.2d at 1357. Fourth, even if an oral contract were established, it would be barred by the statute of frauds. Ill.Rev.Stat. ch. 59, ¶ 1. Since tenure at Northwestern is not acquired until after seven years as an assistant professor, Ms. Lever's claim of "tenure for good service" could not be fully performed in one year and therefore is barred. See *Koch* v. *Illinois Power Co.*, 175 Ill. App. 3d 248, 254 (3d Dist. 1988).

Written Contract

Ms. Lever claims that statements in the Chairman's Handbook and the College of Arts and Sciences Faculty Handbook create a written contract between her and the University. Plaintiff's Brief, pp. 14, 43-44. The Illinois Supreme Court has held that an employee handbook or other policy statement may create enforceable contract rights if: 1) the language of the policy statement contains a promise clear enough that an employee would reasonably believe that an offer has been made; 2) the statement is disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer; and 3) the employee accepted the offer by commencing or continuing to work after learning of the policy statement. *Duldulao* v. *Saint Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 505 N.E.2d 314, 318 (1987).

In order to establish the first element of *Duldulao*, Ms. Lever quotes the following language from the Chairman's Handbook:

> The quality of a candidate's teaching and his future potential as a teacher is a major factor affecting the decision to grant tenure to a faculty member. (p. III.B.7)

> A candidate's performance as an advisor is thus a relevant component in a decision regarding his tenure. (p. III.B.8)

Plaintiff's Brief, p. 14. She quotes the following language from the Faculty Handbook:

> Evidence of the quality of a faculty member's achievement as a teacher-of his or her participation in the department's teaching mission-weighs heavily when that person is recommended for reappointment, whether or not the reappointment involves promotion or tenure.

Plaintiff's Exhibit C-4. None of these statements contain language definite enough to establish a clear promise. In *Duldulao*, the language found to establish a valid contract was very specific and mandatory, e.g., " 'termination contemplated by the hospital *cannot occur* without proper notice and investigation,' " "permanent employees *are never* dismissed without prior written admonitions and/or an investigation,' " and " 'three warning notices within a twelve-month period *are required* before an employee is dismissed.' " *Duldulao*, 505 N.E.2d at 318. In contrast, the above-quoted language from the Chairman's Handbook and Faculty Handbook is too general for Ms. Lever reasonably to believe that an offer was made.

In addition, the Chairman's Handbook was not adequately disseminated to Ms. Lever, because she was never a Department Chairman. Even if she had access to the Chairman's Handbook it was not disseminated to her in such a manner that she reasonably could believe it to be an offer. See *Koch*, 175 Ill. App. 3d at 256-57; *Beavers* v. *Al Baskin Clothing Store*, No. 86 C 2985, 1988 U.S. Dist. Lexis 5402 (N.D. Ill. 1988). Thus, Ms. Lever has failed to establish the existence

of a contract based on University policy. As stated by the court in *Beavers*, "it is one thing to conclude that a violation of an employer's 'policy' could be evidence of pretext in a Title VII case, but quite another to conclude that a 'policy' standing alone results in an enforceable contract absent the requisites of offer, acceptance and consideration." *Beavers*, 1988 U.S. Dist. Lexis 5402 at 7. The court grants summary judgment on the contract claim in the University's favor.

Conclusion

The court denies Northwestern's summary judgment motion as to the Title VII claim and grants its motion as to the contract claim. The court further orders a separate hearing under Fed. R. Civ. P. 42(b) on the timeliness issue. The court sets a status hearing in this case for February 9, 1990 at 9:30 a.m. The parties should discuss settlement prior to that time.

ENTER:

/s/ ANN CLAIRE WILLIAMS
Ann Claire Williams, *Judge*
United States District Court

Dated: Feb 2 1990